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Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

THE COOPER UNION FOR THE ADVANCEMENT OF SCIENCE AND ART,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD and COOPER UNION FEDERATION OF COLLEGE TEACHERS, AFT, NYSUT, AFL-CIO,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

In a mature university whose faculty and administration share responsibility for governance of the institution in a traditional collegial structure, with the faculty exercising significant but not absolute authority in academic matters, are the full-time faculty members "managerial employees" exempt from the coverage of the National Labor Relations Act?

The names of all parties are set forth in the caption.

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NATIONAL LABOR RELATIONS BOARD and COOPER UNION FEDERATION OF COLLEGE TEACHERS, AFT, NYSUT, AFL-CIO,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, The Cooper Union for the Advancement of Science and Art, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this proceeding on January 30, 1986.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at 783 F.2d 29, 121 L.R.R.M. (BNA) 2561 (2d Cir. 1986).

The decision of the National Labor Relations Board is reported at 273 N.L.R.B. No. 214, and substantially reprinted at 118 L.R.R.M. (BNA) 1333 and [1984-85] NLRB Dec. (CCH) ¶ 17,091 (1985).

The findings and conclusions of the Administrative Law Judge are appended to the decision of the National Labor Relations Board as it appears in 273 N.L.R.B., and also as it appears in the Labor library, NLRB file, of Lexis.

In this petition, all citations to the opinion of the Court of Appeals and the decision of the National Labor Relations Board will be to the opinion and decision as reproduced in the Appendix hereto ("App.") at pages 1-8 and 10-28 respectively.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on January 30, 1986. This petition is being filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

National Labor Relations Act

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

STATEMENT OF THE CASE

Facts, Issue, and Positions of the Parties

The Cooper Union for the Advancement of Science and Art ("Cooper Union") was chartered in 1859. It is a private, nonprofit, tuition-free institution of higher learning with degree-granting programs in art, architecture, and engineering. (App. 3.) In 1974 the Cooper Union Federation of College Teachers ("the Union") was certified to represent full-time faculty members at Cooper Union, and in 1978 the Union and Cooper Union entered into their first and only collective bargaining agreement, which expired by its terms in August, 1980. (*Id.*)

In February of 1980, this Court rendered its decision in *NLRB* v. *Yeshiva University*, 444 U.S. 672 (1980) (*"Yeshiva"*). The Court held that the full-time faculty of Yeshiva University is exempt from the coverage of the National Labor Relations Act, 29 U.S.C. §§ 151 *et seq.* ("the Act") by virtue of "the judicially implied exclusion for 'managerial employees' who are involved in developing and enforcing employer policy." *Yeshiva*, 444 U.S. at 682. Believing its full-time faculty likewise to be managerial and thus subject to this Court's *Yeshiva* ruling, Cooper Union withdrew recognition from the Union and declined to negotiate a successor collective bargaining agreement. (App. 11.)

The National Labor Relations Board ("NLRB" or "the Board") commenced this proceeding in 1981, alleging that

Cooper Union's failure to recognize and bargain with the Union in light of the *Yeshiva* decision constituted unfair labor practices under § 8(a)(1) and (5) of the Act. The Board and the Union take the position that the full-time faculty of Cooper Union is not managerial.

Findings and Conclusions of the Trial Judge

The trial of this proceeding, before an Administrative Law Judge of the NLRB, took two months and produced 7000 pages of testimony. On December 15, 1983, the trial judge issued an exhaustive and painstaking decision of 115 single-spaced pages ("ALJ Decision"), concluding that the complaint should be dismissed in its entirety. The judge summarized his 114 pages of findings and conclusions, which were based "[u]pon the entire record in this case, and my observation of the demeanor of the witnesses" (ALJ Decision at 2), as follows (*id.* at 114):

> While the issue is not entirely free from doubt, I conclude that based upon the Cooper Union faculty's predominance and considerable authority in such academic areas as student admissions and class size, academic standards and retention, grading standards, requirements and system, curriculum, calendar, standards and fixing of class and examination schedules, and the protection of academic freedom in the classroom and in the school and due process in the determinations of tenure, promotion, and terminations relating to other than the elimination of entire academic programs, its authority in jointly determining and implementing the most recent academic reorganization placement of humanities faculty and identity and status of its chairperson, and its considerable consultative role in other non-academic areas of faculty concern, such as tenure, promotion, and hiring of full-time faculty, among other areas, the full time faculty employed by Cooper Union exercise managerial authority in sufficient areas deemed significant or "vital" by the Supreme Court and

> the Board so as to share the real responsibility for governance of the institution and to constitute managerial employees within the meaning of the Act. According[ly], I conclude that the allegations of the Complaint have not been sustained.

Decision of the Board

The NLRB rejected the decision of the trial judge, and ordered Cooper Union to recognize and bargain with the Union. (App. 28.) Although the Board disagreed with three of the trial judge's specific findings of fact (App. 24-25), its decision was based not so much upon "our disagreement with certain of his factual findings" as upon "our disagreement with his application of *Yeshiva* principles to the facts of this case." (App. 24.)

Thus, while the Board agreed with the trial judge that Cooper Union's faculty "clearly exercise considerable authority in academic areas such as curriculum, admissions, academic standards, course assignments, and scheduling" (App. 26), it found the faculty to have "considerably less effective authority in the academic sphere than did the faculty in *Yeshiva*" (App. 27), because the authority of the Cooper Union faculty in such matters was "not absolute" and, as the Board interpreted the written record, that authority had "frequently . . . been made ineffective by the administration." (App. 26.)

Turning away from the academic sphere, the Board also expressed the view that, "unlike the Yeshiva faculty . . . , the Cooper Union faculty lacks substantial input into nonacademic matters such as budget, facilities planning, and personnel decisions." (App. 27.) On the basis of these distinctions in the academic and nonacademic areas, the Board concluded that Cooper Union's "full-time faculty members are not managerial employees under *Yeshiva*, but are employees entitled to the protection of the Act." (*Id.*)

Opinion of the Court of Appeals

Upon the Board's petition to enforce its order directing Cooper Union to bargain with the Union, the United States Court of Appeals for the Second Circuit granted enforcement. The court agreed with both the trial judge and the Board that "Cooper Union's faculty has significant authority in certain core academic matters," but nevertheless held that this authority in academic matters did not constitute "effective recommendation or control" as that phrase was used by this Court in the *Yeshiva* case. (App. 6.) And although the trial judge, as noted above, had found the faculty to have a "considerable consultative role" in nonacademic matters (ALJ Decision at 114), the Court of Appeals expressed agreement with what it characterized as "the findings of both the Board and the ALJ that in the nonacademic areas noted by the Court in *Yeshiva* the [Cooper Union] faculty was extremely weak." (App. 7.) For these reasons, the Court of Appeals held that faculty members at Cooper Union were not managerial employees within the principles of the *Yeshiva* case, and granted the Board's petition.

REASONS FOR GRANTING THE WRIT

I

THE CIRCUIT COURTS ARE IN CONFLICT AS TO THE NATURE, AREA, AND DEGREE OF AUTHORITY THAT RENDERS A UNIVERSITY FACULTY "MANAGERIAL" UNDER THIS COURT'S DECISION IN *YESHIVA*

In the National Labor Relations Act, Congress did not intend to permit unionization of employees who as a practical matter are part of management, in the sense that they "formulate and effectuate management policies by expressing and making operative the decisions of their employer." *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 283-84, 288, 289

(1974) (*"Bell Aerospace"*). In *Yeshiva* this Court considered, for the first time, the applicability to a university faculty of this exclusion of "managerial employees" from the coverage of the Act. Although the Court noted that in determining whether a faculty exercises managerial authority in an academic institution "the relevant consideration is effective recommendation or control rather than final authority," 444 U.S. at 683 n.17, it found that the Yeshiva faculty's "authority in academic matters is absolute," and that "faculty members at Yeshiva also play a predominant role" even in nonacademic areas such as faculty hiring, tenure, sabbaticals, termination, and promotion. *Id.* at 686 & n.23.

Given the exceptionally great and pervasive power of the Yeshiva faculty, this Court found "that the faculty of Yeshiva University exercise authority which in any other context unquestionably would be managerial." *Id.* at 686. Accordingly, there was no occasion in the *Yeshiva* case to elaborate upon the nature, area, or degree of authority sufficient to constitute "effective recommendation or control" rendering a university's full-time faculty managerial.

Three circuit courts have now had to contend with these questions in post-*Yeshiva* cases: the Tenth Circuit in *Loretto Heights College* v. *NLRB*, 742 F.2d 1245 (10th Cir. 1984) (*"Loretto Heights"*) (holding a bargaining unit that included part-time teachers to be nonmanagerial); the Seventh Circuit in *NLRB* v. *Lewis University*, 765 F.2d 616 (7th Cir. 1985) (*"Lewis"*) (full-time faculty managerial); and the Second Circuit in the instant case (*"Cooper Union"*) (full-time faculty nonmanagerial). The decisions in these three cases demonstrate a complete absence of agreement among the circuits on the type of control that renders a faculty managerial.

Since further review was not sought in either *Loretto Heights* or *Lewis*, this case presents the needed opportunity for this Court to remedy the disarray in the circuits.

A. Nature of Authority

A fundamental area of conflict in the post-*Yeshiva* cases concerns the effect on a faculty's managerial status of a traditional university structure in which authority is shared between faculty and administration rather than being exercised by either body exclusively. This is a matter of great importance; for as this Court noted in its *Yeshiva* opinion:

> [A]uthority in the typical "mature" private university is divided between a central administration and one or more collegial bodies. . . . This system of "shared authority" evolved from the medieval model of collegial decision making . . . .

Yeshiva, 444 U.S. at 680.

Since the Act's exclusion of managerial employees applies to employees "who are involved in developing and enforcing employer policy" (*id.* at 682)—not just to those who have exclusive or ultimate authority to set policy—this Court in *Yeshiva* rejected out of hand the Board's pre-*Yeshiva* rationales for denying managerial status to faculty members: that "faculty authority is collective" and "final authority rests with the board of trustees." *Id.* at 685. As the Court pointed out, in non-university settings the Board itself has long respected the managerial status of employees who have, "as a group, a substantial voice in the employer's affairs." *Id.* n.21.

The Seventh Circuit followed these principles in *Lewis*. The Board in that case, noting that the university's expired collective bargaining agreement with full-time faculty had expressly reserved to "management" all "power, right, authority, duty, and responsibility to and for the management and operation of the institution," concluded that the faculty members "do not effectively formulate and effectuate the policies of the Employer," and thus "are not . . . managerial employees." *Lewis*, 765 F.2d at 618. In denying the Board's petition for enforcement, the Court of Appeals criticized the Board's failure to recognize the collegial nature of governance at the university as "reflect[ing] a lack of sensitivity to, and

knowledge of, the unique characteristics of a truly academic setting." *Id.* at 626.

In direct contrast, the Second Circuit in the opinion below treated collegiality as evidence of a lack of managerial authority, describing the full-time faculty's authority with respect to academic matters as "weak because of the presence of administrators, nonbargaining unit (part-time) faculty, and students on various committees." (App. 6-7.) The court below did not dispute the trial judge's finding (*ante*, p. 5) that Cooper Union's full-time faculty members "share the real responsibility for governance of the institution" (ALJ Decision at 114); but whereas the Seventh Circuit views such a fact as establishing the managerial status of the full-time faculty, the Second Circuit views it as foreclosing that status.

The Second Circuit's interpretation of the effect of shared authority conflicts not only with that of the Seventh Circuit, but also with the principles laid down by this Court in *Yeshiva*. Because of the fundamental importance of collegiality in the administration of traditional American private universities, this Court should review the decision below to resolve the conflict between the circuits on the issue of shared authority.

B. Area of Authority

In holding faculties to be nonmanagerial, the Second and Tenth Circuits both noted what they perceived as an absence of significant faculty authority outside the academic sphere. *Cooper Union*, App. 7; *Loretto Heights*, 742 F.2d at 1252. On the other hand, the Seventh Circuit, in overruling a Board decision that the faculty of Lewis University was nonmanagerial, paid little attention to nonacademic matters, basing its conclusion that the university's full-time faculty was managerial on the faculty's substantial authority with respect to the central academic concerns of "formulation and implementation of educational policies within the college." *Lewis*, 765 F.2d at 628.

It is self-evident that the professional expertise of full-time university professors lies in the academic sphere; as this Court has recognized, this professional expertise "is indispensible to the formulation and implementation of academic policy." *Yeshiva*, 444 U.S. at 689. In non-university settings it has never been suggested that to be "managerial" an employee must exercise authority beyond his own area of expertise. *See Bell Aerospace*, 416 U.S. at 269-70, 289-90 (buyers in purchasing and procurement department may be managerial employees); *see also, e.g., Sutter Community Hospitals of Sacramento, Inc.*, 227 N.L.R.B. 181, 192-93 (1976) (specialist in neonatology held managerial), *General Dynamics Corp.*, 213 N.L.R.B. 851, 860 (1974) (administrative accountants held managerial). Although in the *Yeshiva* case this Court noted in passing the Yeshiva faculty's "predominant role" in certain nonacademic matters, 444 U.S. at 686 n.23, the Court stressed that

> [t]he "business" of a university is education, and its vitality ultimately must depend on academic policies that largely are formulated and generally are implemented by faculty governance decisions.

Id. at 688.

In view of the disparate treatment of nonacademic matters among the Circuits in post-*Yeshiva* cases, and particularly the stress on nonacademic concerns in the court below, the Court should take this opportunity to clarify whether authority in nonacademic areas of university administration is relevant to the question of a full-time faculty's managerial status, and if so, how much weight may be given to such nonacademic matters.

C. Degree of Authority

Within the academic area, the Tenth Circuit found that full-time and part-time faculty members at Loretto Heights College played a "substantial," albeit circumscribed, role in college governance, *Loretto Heights*, 742 F.2d at 1252, but

nevertheless concluded that the faculty as a whole was nonmanagerial. The Second Circuit, in the decision below, went further and held that a unit limited to full-time faculty was not managerial despite a degree of authority in academic affairs variously described as "predominance and considerable authority" (ALJ Decision at 114, *ante*, p. 4), "considerable authority" (Board decision, App. 26), and "significant authority" (Court of Appeals opinion, App. 6). By contrast, the Seventh Circuit held that "substantial authority, responsibility, and control" of academic policies rendered Lewis University's full-time faculty managerial. *Lewis*, 765 F.2d at 628.

Since nothing like the "absolute" academic authority of the Yeshiva faculty (444 U.S. at 686) was present in any of these post-*Yeshiva* cases, this Court's opinion in *Yeshiva* provides little guidance for such cases. Moreover, the various circuit courts have proved unable to develop among themselves a consistent interpretation of how the general principles first enunciated in *Yeshiva* should be applied to the more common situation where the faculty's authority, though significant, is not absolute. Now that several circuits have struggled—with inconsistent results—with the managerial issue of the *Yeshiva* case in the context of other, more difficult cases, this Court should review the judgment below for the purpose of providing guidelines for uniform application of *Yeshiva* principles.

II

THE QUESTIONS OF FEDERAL LAW RAISED BY THIS CASE ARE OF FUNDAMENTAL IMPORTANCE TO THE GOVERNANCE OF AMERICAN INSTITUTIONS OF HIGHER EDUCATION

A true university is a community of scholars; and it is this traditional collegial approach to higher education that Cooper Union seeks to follow—even to the point of including representatives of the student body on academic committees

(*ante*, p. 9). As this Court emphasized in the *Yeshiva* case, "the concept of collegiality 'does not square with the traditional authority structures with which th[e] Act was designed to cope in the typical organizations of the commercial world,' " since "[t]he Act was intended to accommodate the type of management-employee relations that prevail in the pyramidal hierarchies of private industry." *Yeshiva*, 444 U.S. at 680.

Because the adversarial nature of the labor-management model is at odds with the tradition of shared authority that characterizes "the typical 'mature' private university" in America, *id.*, any decision holding that a university faculty is "nonmanagerial," and thus may be represented by a labor union, has a profound effect on the nature of the institution and the educational process. The great number of private colleges and universities where faculty unionization has been or may be considered makes this an issue of nationwide educational significance, and makes it extremely important that the standards for determining which model shall apply at any given institution—the collegial model or the industrial model—be clearly understood and consistently applied.

It is clear that in the National Labor Relations Act Congress did not contemplate that university faculties might some day be regarded as appropriate subjects for unionization. *Yeshiva*, 444 U.S. at 679-80 & n.9. More generally, Congress did not intend that the Act be applied in such a way as to create an artificial division between employers and managerial employees, since "an employer is entitled to the undivided loyalty of its representatives." *Id.* at 682; *see Bell Aerospace*, 416 U.S. at 289. Accordingly, as the Seventh Circuit points out in its well-considered application of the principles laid down by this Court in *Yeshiva*, any proposal for "unit certification or union representation of university faculty members" must be analyzed with "caution at all times so as not to interfere with or upset the delicate balance of the school's governing structure." *Lewis*, 765 F.2d 626. Only if it is perfectly clear that the actual structure of an institution

has more in common with the industrial model than with the traditional collegial model can it be justifiable to treat the faculty members as nonmanagerial employees subject to the National Labor Relations Act.

As the court below has interpreted the *Yeshiva* decision, slight variations in administrative structure among institutions sharing the same basic collegial approach to higher education can result in profoundly different treatment of the institutions under the Act. Not only does this interpretation engender burdensome and expensive litigation to determine, in the first instance, on which side of a very vague line a particular university falls; it also invites periodic relitigation of the entire matter, as small shifts in committee structure or patterns of governance occur which might tip the balance one way or the other.

Neither the National Labor Relations Act nor this Court's decision in *Yeshiva* was intended to create continual uncertainty in a matter of such fundamental importance to American private institutions of higher education. This Court should review the decision below in order to clarify whether *Yeshiva* was intended to require intensive litigation over narrow distinctions among fundamentally similar institutions of higher learning, and in order to provide guidance in distinguishing academic institutions governed by industrial principles from mature universities embodying traditional principles of collegiality.

CONCLUSION

A writ of certiorari should issue to review the judgment below.

Respectfully submitted,

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April 29, 1986

APPENDIX

OPINION OF THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 395—August Term, 1985

(Argued November 22, 1985 Decided January 30, 1986)

Docket No. 85-4063

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

—v.—

THE COOPER UNION FOR THE ADVANCEMENT OF SCIENCE AND ART,

Respondent,

THE COOPER UNION FEDERATION OF COLLEGE TEACHERS,

Intervenors.

Before:

FEINBERG, *Chief Judge*,
MANSFIELD and OAKES, *Circuit Judges*.

Petition by NLRB to enforce its order requiring Cooper Union to bargain with its faculty union representative, on the basis that faculty are not managerial or supervisory.

Enforcement granted.

MICHAEL D. FOX, National Labor Relations Board (Rosemary M. Collyer, General Counsel; Paul J. Spielberg, Deputy Assistant General Counsel; John E. Higgins, Jr., Deputy General Counsel; Robert E. Allen, Associate General Counsel; Elliott Moore, Deputy Associate General Counsel, of counsel), *for Petitioner.*

JOHN W. DEAN, Milbank, Tweed, Hadley & McCloy, New York, NY (Eugene F. Farabaugh, John M. Hinchcliff, William H. Roth, Milbank, Tweed, Hadley & McCloy, New York, NY, of counsel), *for Respondent.*

JOHN J. NAUN (James R. Sandner, New York, NY; J. Christopher Meagher, of counsel), *for Intervenor.*

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PER CURIAM:

The National Labor Relations Board ("Board" or "NLRB") petitions this court to enforce its order directing the Cooper Union for the Advancement of Science and Art ("Cooper Union") to bargain with a bargaining representative of its full-time faculty members on the grounds that they are neither managerial nor supervisory employees. We grant the petition.

BACKGROUND

Cooper Union is a private, nonprofit, tuition-free institution of higher education located in Manhattan, consisting of three degree-granting schools: The Schools of Art, Architecture, and Engineering.[1] Cooper Union has a student body of approximately 900 to 1,000 students and employs approximately fifty-five to sixty full-time and eighty part-time faculty members. The Cooper Union Charter vests ultimate authority in a sixteen-member board of trustees, a board which has no faculty representatives on it.

In 1974, following an NLRB-supervised election, the Cooper Union Federation of College Teachers, AFT, NYSUT, AFL-CIO ("the Union") was certified to represent a unit of full-time faculty members and librarians. Part-time (adjunct) faculty, deans, assistant deans, division heads, and the library head were excluded from the bargaining unit. In 1978 the Union and Cooper Union entered into their only collective bargaining agreement, which expired in August, 1980. Shortly before this expira-

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1. Prior to 1975, the Schools of Art and of Architecture were combined as one school—the School of Art and Architecture.

tion date, and following the Supreme Court's decision in *NLRB v. Yeshiva University*, 444 U.S. 672 (1980), Cooper Union withdrew its recognition of the Union and refused to bargain with it.

An administrative law judge dismissed a complaint against Cooper Union that charged it with unfair labor practices under section 8(a)(5) and (1) of the National Labor Relations Act ("the Act"), 29 U.S.C. § 158(a)(5) and (1) (1982). He concluded that the full-time faculty were managerial employees within the meaning of *Yeshiva*, and therefore outside the protections of the Act. The Board reversed the ALJ, finding that the bargaining unit members did not exercise sufficient authority over academic matters to be considered managerial employees under *Yeshiva*.

DISCUSSION

Our role in reviewing a decision of the Board is a limited one. Congress has assigned to the Board the primary function of balancing competing interests to effectuate national labor policy, and this court will enforce the Board's application of a rule that is rational, consistent with the Act, and supported by substantial evidence on the record as a whole. *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 500-01 (1978).[2]

2 We recognize that when the Board makes findings inconsistent with the ALJ, as here, the findings are more open to question than if the Board and the ALJ had reached the same result, but only if the evidence turns on the credibility of the witnesses. *Local 259, UAW v. NLRB*, 776 F.2d 23, 27 (2d Cir. 1985); *Ewing v. NLRB*, 732 F.2d 1117, 1120-21 (2d Cir. 1984). Although the ALJ apparently made some findings based on credibility, they do not overcome the extensive findings made by both the ALJ and the Board that the administration exercised extraordinary authority in both academic and nonacademic areas.

Although the Act does not explicitly exclude managerial employees, as it does supervisors, *see* 29 U.S.C. § 152(3), the Supreme Court has held that the Act implies such an exclusion. *See NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 288-89 (1974). The rationale behind this exclusion is that "an employer is entitled to the undivided loyalty of its representatives." *Yeshiva*, 444 U.S. at 682. The Court has defined managerial employees as those who " 'formulate and effectuate management policies by expressing and making operative the decisions of their employer.' " *Bell Aerospace*, 416 U.S. at 288 (quoting *Palace Laundry Dry Cleaning*, 75 N.L.R.B. 320, 323 n.4 (1947)).

In *Yeshiva* the Court held that this definition applies to those college faculties that "exercise discretion within, or even independently of, established employer policy," adding that the faculty "must be aligned with management." *Yeshiva*, 444 U.S. at 683. Under *Yeshiva*, a faculty need only exercise "effective recommendation or control, rather than final authority," to be managerial. *Id.* at 683 n.17. The Court found that the Yeshiva faculty's authority was "absolute" in "academic matters" such as course offerings, scheduling, grading, matriculation, and admissions, *id.* at 686, and that the faculty "play a predominant role in faculty hiring, tenure, sabbaticals, termination and promotion." *Id.* at 686 n.23.

Although the Court concluded that Yeshiva's faculty was managerial, it noted that there may be faculty at other institutions of higher learning that are nonmanagerial. *Id.* at 690 n.31. In the wake of *Yeshiva*, the Board and courts of appeals have engaged in intensive fact-based analyses to determine whether a particular college faculty is managerial. *See, e.g., NLRB v. Lewis Univer-*

sity, 765 F.2d 616 (7th Cir. 1985); *Loretto Heights College v. NLRB*, 742 F.2d 1245 (10th Cir. 1984); *College of Osteopathic Medicine & Surgery*, 265 N.L.R.B. 295 (1982); *Ithaca College*, 261 N.L.R.B. 577 (1982).

Cooper Union's faculty has significant authority in certain core academic matters, but certainly not the "absolute" authority of Yeshiva's faculty, nor even "effective recommendation or control." *See Yeshiva*, 444 U.S. at 683 n.17. The evidence before the Board shows that, in response to financial concerns, the trustees instituted major changes in 1972-73 with minimal faculty input and against strong faculty opposition.[3] The trustees again restructured Cooper Union in 1975 without faculty participation and over their strong opposition.[4] The authority of bargaining unit faculty over academic matters was also weak because of the presence of administrators, nonbargaining unit (part-time) faculty, and students on various

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3. The 1972 changes included consolidation of departments into larger divisions, replacement of faculty-elected department chairpersons with division heads appointed by the president, the creation of new degree programs in mathematics, physics, and the distributive sciences, and the creation and filling of the position of provost.

   In 1973 the administration implemented changes that included increasing class size, the student-faculty ratio, and teaching loads, severely limiting tenure grants, reducing the number of full-time faculty through attrition, and increasing the proportion of adjunct faculty. These changes were implemented while still under consideration by the student-faculty senate.

4. These changes included eliminating the divisions and division heads, leaving the schools as the primary structural academic units, dividing the School of Art and Architecture into two separate schools, creating the "Faculty of Liberal Arts and Science" entirely outside the degree-granting schools, thereby effectively disenfranchising almost half the faculty, and eliminating the curricula leading to degrees in mathematics, physics, and distributive science. As a result of these changes, eight tenured faculty members were laid off permanently.

committees, and the power of deans to control the agenda and meeting times of many of the committees. The Board's findings that the committee structure and the changes that Cooper Union's administration unilaterally instituted[5] often rendered faculty authority ineffective in core academic areas are amply supported by the record.

The evidence also strongly supports the findings of both the Board and the ALJ that in the nonacademic areas noted by the Court in *Yeshiva* the faculty was extremely weak. The Cooper Union faculty has virtually no role in the areas of budget and facilities. Even faculty access to ordinary office supplies is restricted. The faculty has no input into the appointment, retention, or employment conditions of nonteaching staff. Faculty input into appointment of teaching staff and administrative positions has frequently been bypassed, and faculty tenure and promotion recommendations have frequently been rejected. *Compare Lewis University*, 765 F.2d at 623 (president vetoed only five of 118 faculty recommendations for tenure and promotion; faculty found managerial); *Loretto Heights College*, 742 F.2d at 1250 (although president had in recent years accepted all faculty committee recommendations on promotion and tenure, Board and court found faculty nonmanagerial); *Ithaca College*, 261 N.L.R.B. at 578 (faculty recommendation in tenure and promotion followed in 119 of 120 cases; faculty found managerial). The administration, not the faculty,

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5. In 1975 the dean of the School of Engineering, without faculty consideration, promulgated an amended governance for that school that, inter alia, delegated all administrative functions to the dean. Over strong faculty opposition, in 1977 Cooper Union entered into a library consortium that delegated administrative control and purchasing to New York University.

makes leave-of-absence and even sabbatical determinations.[6]

The Board had before it an extensive record of faculty-administration conflict arising out of the unilateral changes instituted by the administration in the early to mid-1970's. This conflict culminated in the Senate dissolving itself and in the faculty's decision to engage in collective bargaining. *Yeshiva* makes clear, of course, that the fact that a college faculty chooses to unionize does not mean it is nonmanagerial. However, we would have to ignore the extensive evidence of conflict and of broad administrative authority to implement changes over faculty opposition in core academic areas such as curriculum to find that the Cooper Union faculty is "aligned with management." For example, after Cooper Union on June 26, 1980, asserted that the faculty were managerial employees and refused to bargain with the union, it unilaterally revised the governances and terms and conditions of employment. We agree that the Board had before it substantial evidence that the Cooper Union faculty did not exercise effective recommendation or control in academic or nonacademic areas, and that they are not managerial or supervisory employees.[7] Accordingly, we grant the petition to enforce the Board's order to Cooper Union to recognize and bargain with the Union.

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6. A 1978 evaluation team from the Middle States Association of Colleges found that Cooper Union's structure was distinguished by the fact that the deans were unusually strong and the faculty unusually weak. The team noted inter alia the absence of a mechanism by which the faculty could review institution-wide academic policies and priorities.

7. We do not intend by this opinion either to criticize or condone the actions taken by Cooper Union's administration in response to serious financial pressures. We simply make clear that the consequence of such actions may be to make a college faculty nonmanagerial within the meaning of *Yeshiva* and the Act.

MANDATE OF THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the thirtieth day of January one thousand nine hundred and eighty-six

Present: HON. WILFRED FEINBERG,
Chief Judge,
HON. WALTER R. MANSFIELD,
HON. JAMES L. OAKES,
Circuit Judges,

NATIONAL LABOR RELATIONS BOARD, *Petitioner*, -v- THE COOPER UNION FOR THE ADVANCEMENT OF SCIENCE AND ART, *Respondent*, THE COOPER UNION FEDERATION OF COLLEGE TEACHERS, *Intervenors*.	Docket No. 85-4063

A petition for enforcement of an order of the National Labor Relations Board.

This cause came to be heard on the certified list of items comprising the record of the National Labor Relations Board and was argued by counsel.

UPON CONSIDERATION THEREOF, it is hereby ordered, adjudged and decreed that the petition for enforcement be and hereby is granted in accordance with the opinion of this court with costs to be taxed against the respondent.

ELAINE B. GOLDSMITH,
Clerk

/s/ EDWARD J. GUARDARO
by EDWARD J. GUARDARO,
Deputy Clerk

DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

THE COOPER UNION FOR THE ADVANCEMENT OF SCIENCE AND ART and COOPER UNION FEDERATION OF COLLEGE TEACHERS, AFFILIATED WITH NEW YORK STATE UNITED TEACHERS, AMERICAN FEDERATION OF TEACHERS, AFL-CIO	Case 2-CA-17483

DECISION AND ORDER

On 15 December 1983 Administrative Law Judge Robert T. Snyder issued the attached decision. The General Counsel and the Charging Party filed exceptions and supporting briefs, the Respondent filed cross-exceptions and a brief in support of the order dismissing the complaint, and the New York City Central Labor Council, AFL-CIO filed an amicus brief in support of the Charging Party's exceptions.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision and Order.

The judge found that the Respondent did not violate Section 8(a)(5) and (1) of the Act by withdrawing recognition from and refusing to bargain with the Union. For the reasons set forth below, we do not agree.

The Respondent is a private, state-chartered, tuition-free institution of higher education consisting of three professional

[1]No exceptions were taken to the judge's findings that the Respondent's assistant librarians exercise neither supervisory nor managerial authority.

degree-granting schools: Engineering, Art, and Architecture. It has a student body of approximately 900, about half of whom are engineering students, and a full-time faculty of approximately 60. In 1974 the Union was certified to represent a unit of full-time faculty members and librarians. Part-time (adjunct) faculty were not included in the bargaining unit. In 1978 the parties entered into their only collective-bargaining agreement, which expired in August 1980. Shortly before the expiration of the agreement the Respondent by its president Lacy informed the Union that it would not negotiate with the Union for a new agreement because it considered the faculty to be managerial employees within the meaning of the Supreme Court's opinion in *NLRB v. Yeshiva University*, 444 U.S. 672 (1980). The issue in this case is whether the faculty employed by the Respondent "formulate and effectuate management policies by expressing and making operative the decisions of their employer,"[2] such that they are managerial employees excluded from the coverage of the Act. We summarize below the facts which we regard as determinative of the issues. We review first the formal governance structure for faculty participation in institutional decision making and then actual governance practice.

Formal Governance

The Respondent's charter vests ultimate management and control in a board of trustees. Currently there are 16 trustees, 3 of whom are alumni representatives. There are no faculty representatives. The Respondent's bylaws vest in the president general supervisory powers over its activities, subject to the trustees' control. The bylaws provide that the president's powers include the appointment and removal of administrators, faculty, and staff, and the determination of their duties. The bylaws also vest general supervisory powers over academic affairs and academic officers in a provost. Since 1964 the faculty's role in institutional decision making has been defined formally in a faculty policy manual and a set of "governances." Each professional school has its own governance. The governances have been amended a number of times. Pursuant to the governances, the faculty members of each school meet as a separate deliberative body, collectively referred to as the school's faculty. The governances define the faculty of each school to include, as voting members, the dean and any assistant or associate deans, as

[2] *Yeshiva*, supra at 682, quoting *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 288 (1974).

well as all full-time faculty members of the school. The dean of each school is designated the permanent chairperson of its faculty with responsibility for calling and presiding over faculty members, preparing the agenda, and communicating faculty actions to the president. The governances call for two or three regular faculty meetings each year (depending on the school) and any number of special meetings. The governances also provide for institutionwide joint faculty meetings to be called and presided over by the president. No frequency for such meetings is specified. Each governance provides that it may be amended by a vote of two-thirds of the school's faculty and approval by the trustees.

Under the governances, the duties and responsibilities of the faculties are to be carried out primarily through members' participation in standing committees. Each school has its own administrative, admissions, academic standards, and curriculum committees.[3] There are also two institutionwide standing committees, Academic Freedom and Tenure (AF&T) and Student Activities, and an institutionwide student-faculty Senate.

According to the governances, the administrative committee of each school is responsible for the "general administration" of the school including financial and personnel matters; for approval of curriculum changes proposed by the curriculum committee; and for nomination of candidates for positions on the standing committees. The administrative committee is required to represent faculty interests and to interpret those interests to the president, and it is to serve as advisor to the dean. The dean of each school chairs its administrative committee. In the Schools of Art and Architecture, full-time faculty members constitute both a numerical and a voting minority on the administrative committees, sharing seats with administrators, students, and adjunct faculty members.

The curriculum committees have responsibility for receiving, formulating, and processing proposed curriculum changes. The curriculum committee in each school must forward proposals for curriculum changes to the administrative committee, which may approve minor changes (such as the substitution of one course for a similar course), but must forward proposals for major changes to the faculty for its approval. The faculty must then

[3]According to the governances, each school also has a calendar and schedules committee. However, the record reflects that the calendar and schedules committees have been inoperative for most of the 10 years preceding the hearing.

submit major curriculum changes which it approves to the president. In the Schools of Art and Architecture, the membership of the respective curriculum committees consists of two full-time faculty members, one adjunct faculty member, and one student as voting members; and the dean of the school, the dean of admissions, and an alumni representative as nonvoting members. The chairperson must be a full-time faculty member. In the Engineering school, the committee is composed of one full-time faculty member from each of the four disciplines. The dean of the Engineering school is designated an "ex officio" member, but the Engineering governance, unlike the governances for Art and Architecture, does not provide that the dean has no vote.

The academic standards committees have responsibility for receiving and considering proposed changes in the grading system and academic standards. Minor changes may be acted on by the committee. Major changes must be approved by the faculty and the president. The committees also have final authority to pass on petitions for readmission from students who have withdrawn or have been dropped for academic reasons, as well as responsibility for compiling a list of recommended candidates for graduation. In the Schools of Art and Architecture, each academic standards committee is composed of three full-time faculty members, one student, and one adjunct faculty member as voting members; and the dean of the school, the dean of admissions, and the dean of students as nonvoting members. The chairperson must be a full-time faculty member. In Engineering, the committee is composed of four full-time faculty members and three deans. Again, the deans are designated "ex officio," but, unlike the deans on the corresponding committees in the other two schools, are not designated as nonvoting.

The admissions committees are responsible for establishing and reviewing admissions, procedures pursuant to institutional and faculty policies. In the Schools of Art and Architecture, the committees are each composed of two full-time faculty members, one student, and one adjunct faculty member as voting members; and the dean of the school, the dean of admissions, and an alumnus as nonvoting members. The chairperson must be a full-time faculty member. In Engineering, the committee is composed of three full-time faculty members, the dean of admissions, and a student as voting members; with the dean of the school as an ex officio member.

The Academic Freedom and Tenure Committee is an all faculty, institutionwide body with limited authority set forth in the faculty policy manual to hear disputes involving alleged infringements of faculty members' academic freedom and termination of tenured faculty allegedly without adequate cause. Adequate cause for termination of tenured faculty is defined as professional incompetence, conviction of a crime involving moral turpitude, or a change in academic program or the existence of a financial condition that requires elimination of the position. Actions of the AF&T Committee are subject to review by the trustees. The committee has no authority to consider types of disciplinary action or other grievance matters beyond those specified in the manual.

The Student Activities Committee is an institutionwide committee with responsibility for formulating, proposing, and monitoring student policy. Students constitute a majority of the voting members; the dean of students is a voting member.

The Senate's role is to study the goals, standards, facilities, planning, development, and problems of Cooper Union, and to serve as advisor to the president. Its voting membership is approximately balanced between full-time faculty members and students,[4] with four administrators including the president serving as nonvoting members.

An examination of the composition of the governance committees reveals that full-time faculty (bargaining unit) members are a numerical minority on most and are a voting majority on only about half of the committees. In two of the Respondent's three schools, Art and Architecture, full-time faculty members are a voting majority only on the academic standards committees. Full-time faculty members chair most of the committees. However, the administrative committee in each school, which has the broadest authority of any committee (including the authority to review actions of certain other committees and authority to nominate members to the other committees), is chaired by the dean.

The governances give the faculty certain responsibilities beyond those exercised through standing committees and the Senate. These include recommending degree candidates to the president, advising the respective deans on the filling of faculty positions, and recommending candidates to fill vacancies in the

[4]Two Senate seats may be filled either by full-time faculty members or by adjuncts. Therefore, full-time faculty members may or may not be a voting majority of the Senate, depending on whether those seats are filled by full-time faculty members.

offices of dean and president. In the filling of faculty positions, the governances require only that the dean "consult" with faculty members. When a deanship or the presidency is to be filled, the governances call for the formation of a special faculty committee to submit a list of recommended candidates.

The faculty policy manual sets forth certain rights of faculty members beyond the rights and duties specified in the governances. It provides that a faculty member is eligible for sabbatical leave after each consecutive 7 years of service, but that the granting of sabbaticals to eligible members is in the discretion of the president. The manual sets time limits for achieving tenure. It provides that a faculty member should be granted tenure "as soon as he has demonstrated his competence and a satisfactory development of his teaching and scholarship." It encourages faculty members to engage in their own research, writing, artistic endeavors, and professional activities including consulting, so long as such activities do not conflict with academic duties.

Faculty Authority in Practice

Having reviewed the faculty's formally defined status, we now examine the role actually played by the faculty in the affairs of the Respondent during the approximately 10 years preceding the hearing in the present case.

Prior to 1972 the teaching staff of Cooper Union was organized in departments chaired by faculty members. By action of the trustees that year, taken without faculty vote or other faculty approval, the departments were consolidated into larger divisions, with division heads appointed by the president. The administration thereafter rejected a faculty recommendation that the departmental structure be restored and rejected a separate faculty recommendation that division heads be elected by faculty members.[5] Among other changes brought about by the elimination of the departmental structure was a decrease in faculty authority over the academically related activities of nonteaching staff such as laboratory assistants and secretaries. In addition to replacing the departmental structure with a divisional structure, the trustees in 1972 also created new degrees in

[5]The Respondent's then president White rejected a governance amendment passed by the faculty of the School of Art and Architecture (then a single unit) requiring division heads to be elected by the faculty.

mathematics and science. They also created and filled the position of provost. The faculties did not have an opportunity to vote on or otherwise approve or disapprove these changes.

In 1973 the provost, Kaplan, issued a report recommending increasing class size, increasing the student-faculty ratio, increasing teaching loads, severely limiting grants of tenure, reducing the number of full-time faculty through attrition, and increasing the proportion of adjunct faculty. While the Senate was considering these proposals, they were implemented without faculty approval and over strong faculty opposition. When members of the Senate confronted the provost with the fact that the proposals were being implemented while still under Senate consideration, the provosts responded to the effect that the Senate could be most useful by simply approving the proposals. In accord with the provost's recommendation, then president White began rejecting many tenure recommendations even where a candidate had received unanimous faculty support. The decisions denying tenure were made largely for financial reasons, ignoring the exclusively academic criteria for the granting of tenure set forth in the faculty policy manual.

In 1975 the trustees again restructured the institution without faculty participation and over strong faculty opposition. The 1975 reorganization eliminated the divisions and the division head positions, leaving the schools the primary structural academic units. It divided what had been the School of Art and Architecture into two separate schools. It established a new "Faculty of Liberal Arts and Science" (LA&S) entirely outside of the degree-granting schools, placing nearly half the faculty members (some from Art and Architecture and some from Engineering) in the new group. The LA&S faculty members were thereby disenfranchised, no longer having a vote on the faculty of any degree granting school, or authority to participate in its governance committees. (No governance was established for the LA&S faculty.) Provost Kaplan was designated acting dean of the new faculty. Also in the 1975 restructuring, the trustees eliminated the curricula leading to degrees in mathematics, physics, and distributive science, and eliminated physical education as a regular part of the curriculum. As a result, a number of tenured faculty members were permanently laid off.

Faculty opposition to the changes brought about in 1975 was widespread and sustained, particularly with respect to the creation of the LA&S faculty and the elimination of the degree

programs. During a Senate meeting in which strong criticism of the 1975 changes and the way in which they were implemented was voiced, White informed the Senate that he was neither required to consult with the Senate nor to accept its advice. The Senate then voted to cease meeting because it was a group without any power. It remained defunct for approximately 3 years, until after the collective-bargaining agreement was entered into. During the same period, the administration successfully resisted an attempt by the tenured faculty members who had been laid off to gain a hearing before the Academic Freedom and Tenure Committee.[6]

Also following the 1975 reorganization, the dean of the School of Engineering, without faculty consideration, promulgated an amended governance for that school. The dean's governance eliminated the administrative committee, delegating all administrative functions to the dean. It also created a new interim curriculum committee chaired by the dean. These amendments apparently remained in effect for approximately 4 years until newly revised governances were issued after the bargaining agreement was entered into.

In the late spring of 1977 President White announced plans for Cooper Union to enter into a library consortium agreement with New York University (N.Y.U.) and another university under which, among other things, administrative control and purchasing for the libraries of all three schools would be delegated to an N.Y.U. administrator. White asked for faculty response to the plan. The faculties of all three schools strongly opposed implementation of any such consortium agreement, pending further study. They voiced concerns on academic grounds including fear of loss of valuable library materials from Cooper Union's libraries and inability to readily procure new materials for the library. During the summer recess, before the faculties had had further opportunity to consider the matter, and over their expressed opposition, the Respondent entered into the consortium agreement. Two years later, in the summer of 1979,

[6]The Respondent took the position that the elimination of the degree programs was not a change in academic program within the meaning of the academic freedom and tenure provisions of the faculty policy manual, and therefore was not cognizable by the Academic Freedom and Tenure Committee. The laid-off faculty members sought to gain a hearing before that committee by bringing a state court suit. The Respondent took the position before the state court that the trustees had an unreviewable right to make decisions on academic programs and cited other examples of the trustees having done so without faculty input. The state court denied the laid-off faculty members' request for a hearing before the Academic Freedom and Tenure Committee.

the library consortium agreement was extended prematurely and without notice to the faculty at a time when a faculty committee was at work on proposed revisions to the agreement.

In 1978 an organization responsible for accrediting educational institutions, the Middle States Association of Colleges and Schools, issued a report on Cooper Union, following a detailed review of all aspects of the institution. The report commended Cooper Union in certain areas, particularly the handling of its financial resources, but found serious problems in the areas of faculty morale, faculty governance, long range planning, and the library consortium. The report found that the Respondent's deans were unusually strong and its faculty unusually weak. The report noted that the administration of Cooper Union had asserted the right to take actions affecting the institution in the absence of advice from the faculty or the Senate, and even contrary to such advice and then commented, "No doubt the right exists but to the degree it is exercised, confidence in faculty governance is subverted, and faculty morale declines." The report was especially critical of the Respondent for the morale problems caused by the creation of the academically isolated and disenfranchised LA&S faculty. The report also noted the absence of any provision for faculty review of institutionwide academic policies and indicated that the writers shared the concerns of the faculty that the library consortium would not lead to an improvement in the institution's library services.

The collective-bargaining agreement, entered into in 1978, contained, among others, provisions setting salary levels; stating principles of academic freedom; setting procedural guidelines for the appointment, promotion, and tenure of faculty members; defining workload; establishing a grievance and arbitration procedure; and defining management rights. Shortly after the agreement went into effect, the Union president Tulchin and the Respondent's president White jointly issued governances which reflected changes necessitated by the bargaining agreement, such as the elimination of the Academic Freedom and Tenure Commmittee in view of its functions having been taken over by the grievance and arbitration procedure. Tulchin also entered into discussions with Provost Kaplan concerning the LA&S faculty. These discussions, sanctioned by the Union's executive committee, resulted in a 1979 decision to reintegrate the LA&S faculty into the faculties of the degree-granting schools, reenfranchising them as members of those faculties.

Following the Respondent's 1980 withdrawal of recognition from the Union, the Respondent's new president Lacy revised the governances to reinsert those provisions taken out because of the bargaining agreement and to reflect the structural changes brought about by the reintegration of the LA&S faculty. The faculty did not participate in or vote on these revisions. In conformance with the revised governances, Lacy reinstituted the Academic Freedom and Tenure Committee.[7] Elected faculty members agreed to serve on that committee under protest. In 1981 Lacy announced certain increases in faculty salary levels. The faculty did not participate in setting the amounts of these increases.

In addition to the major institutional decisions and events outlined above, certain other facts are indicative of the relative authority of the Respondent's faculty and its administration. As described more fully in the judge's decision, faculty members regularly participate, primarily through the governance committees, in decisions regarding admissions, academic standards (including student retention, readmission, and graduation), and curriculum. Yet the effectiveness of the faculty's role in each of these areas is limited. A limitation on the faculty's authority which pervades all three areas is the extent of administration and other nonfaculty representation on the committees, as described above.

In the area of admissions, although faculty members play a major role in setting admissions standards and, in the Schools of Art and Architecture, passing on the applications of individual candidates, goals for the numbers of students to be admitted are determined by the administration. In the School of Engineering, the exact number to be admitted is set by the administration. Further, the dean of admissions testified that he implemented a program for admissions of minority students in engineering without faculty or admissions committee approval and in the presence of mixed faculty opinion.

In the curriculum area, courses suggested by individual bargaining unit or nonbargaining unit teaching staff are frequently instituted on the approval of the dean without going through the curriculum and administrative committees. In addition to the

[7]When Lacy reinstituted the AF&T Committee it had been inoperative for approximately 6 years. Its members had resigned in 1975 during a dispute over whether the committee should hear the complaint of a faculty member who had been denied tenure.

major curriculum changes noted above brought about by decision of the trustees to create and eliminate degree programs, a curriculum-related change was brought about by the dean of the Engineering school in the area of physics over the unanimous opposition of the full-time physics faculty.[8]

In the area of academic standards, the faculty plays perhaps its strongest role. The governances make decisions of the academic standards committees final in the area of student petitions for readmission. Grade point averages required to remain enrolled and to graduate are set by the committees with faculty approval. Although theoretically subject to administrative approval, there is no evidence that committee and faculty recommendations in this area have ever been overturned. Nevertheless, the authority of faculty members in the academic standards area is mitigated by the admitted active participation and voting—in contravention of the governances—of the deans of admissions and students on all three academic standards committees.[9] This means that although a theoretical voting majority on these committees, faculty members in fact are a voting minority. Faculty and administrators share responsibility for developing the academic calendar and course schedules, but the deans assign faculty members to teach required courses. Although faculty members have some input, the dean's view prevails in the event of a conflict.

A final limitation on the exercise of faculty authority in academic matters is the ability of administrators in key positions to prevent faculty groups from meeting. The Respondent's president has sole authority to call joint faculty meetings. Following a 1975 joint faculty meeting in which a motion was made to censure President White for allegedly interfering with the Academic Freedom and Tenure Committee, White called no more faculty meetings for the remaining 4 years of his presidency. Similarly, the dean of the Architecture school prevented

[8]The dean determined that two physics courses should be among the courses used for an experimental program employing innovative teaching methods. The full-time physics faculty, for academic reasons, unanimously opposed using the new program in the physics courses. The dean insisted that the courses be taught in the experimental mode and brought in a retired physics professor to teach them when the full-time faculty members refused.

[9]We further note that in two instances the dean of the School of Architecture, in contravention of normal procedure and over the apparent opposition of the faculty involved, permitted students who had failed a required fourth year course, which was prerequisite to a required fifth year course, to take both courses simultaneously in their fifth year, thereby also permitting the students to exceed the normal credit limit in their fifth year.

its administrative committee from meeting for a period of 4 years from 1977 to 1981 by failing to call any meetings. During that time the administrative committee's function in reviewing proposed curriculum changes was simply bypassed.

In nonacademic matters, the very limited effective role played by the faculty has been set forth fully in the judge's decision. Certain points in this regard bear emphasis. The faculty has virtually no role in the areas of budget and facilities. Major decisions to sell and renovate facilities and to relocate personnel and activities within them have been made without faculty input or over faculty opposition. Similarly, faculty office space is assigned by the administration and, at least in the Engineering school, even faculty access to ordinary office supplies is restricted. Faculty members have no input into the appointment, retention, or employment conditions of nonteaching staff such as laboratory assistants, shop assistants, library personnel, and secretaries. In regard to the appointment of teaching staff, although the governances call for a consultative faculty role, such a role has frequently been bypassed. Similarly, although faculty members have regularly been consulted on tenure decisions, their recommendations have frequently been reversed. Faculty members have no role in granting sabbatical leaves. In the selection of deans, the faculty role called for in the governances has sometimes been ignored. In the selection of a president to take White's place in 1979, the procedure for faculty input called for in the governance was not followed.[10] Other administrative positions have been created and filled without faculty input.

The Legal Standard—*Yeshiva* and Its Progency

In *NLRB v. Yeshiva University*, 444 U.S. 672 (1980), the Supreme Court found that the faculty members were managerial employees excluded from the coverage of the Act. It defined managerial employees, as both the Board and the Court previously had, to be those who "formulate and effectuate management policies by expressing and making operative the decisions of their employer."[11] The Court refined this definition by holding that managerial employees "must exercise discretion within or

[10]Instead of forming the special faculty committee called for in the governances to submit names of qualified candidates to the trustees, a large number of candidates were screened and interviewed with no faculty input. The Senate was then permitted to interview and make recommendations on the top two candidates previously selected by the administration. The candidate whom the Senate recommended, Lacy, was chosen by the trustees.

[11]444 U.S. at 682, quoting *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 288 (1974).

even independently of established employer policy and must be aligned with management" and normally must "represent management interests by taking or recommending discretionary actions that effectively control or implement employer policy."[12] The Court held that the purpose of excluding managerial employees, like the purpose of excluding supervisors from the Act's coverage, is to assure employers of the undivided loyalty of their representatives.

The Court found that the faculty at Yeshiva, through participation in faculty meetings and on faculty committees, determined each school's curriculum, academic calendar, course schedules, admissions and matriculation standards, teaching methods and grading policies, and sometimes determined tuition, the size of the student body, and the location of a school. The Court concluded that the faculty's control of academic matters was absolute. In nonacademic matters, the Court found that the faculty played the predominant role in decisions on faculty hiring, tenure, sabbaticals, termination, and promotion. The Court noted that although the final decisions on such personnel matters are made by the administration, the faculty makes recommendations in all cases and "the overwhelming majority of faculty recommendations are implemented."[13] The Court also noted that, at least in some of the schools, budget requests were made by faculty, and that in the case of one school such requests had never been rejected. The Court found unpersuasive the fact that many faculty decisions were subject to rarely exercised veto power in the administration. In concluding that the Yeshiva University faculty were managerial employees, the Court relied primarily on their extensive authority over academic affairs, but also noted their predominant authority in nonacademic matters. The Court noted that at other institutions, unlike Yeshiva, faculty members may be nonmanagerial, depending on the extent of their authority, commenting, "It is plain, for example, that professors may not be excluded merely because they determine the content of their own courses, evaluate their own students, and supervise their own research."[14]

Since the Supreme Court decided *Yeshiva*, the Board has determined the managerial or nonmanagerial status of college and university faculty members in a variety of faculty settings. For example, in *Ithaca College*, 261 NLRB 577 (1982), the

[12]Id. at 683.
[13]Id. at 677.
[14]Id. at 690-691 fn. 31.

Board found that the faculty, through participation in both institutionwide and divisional bodies, determined curriculum, admissions policies, academic standards, class size, course schedules, teaching assignments, graduation requirements, and other academic matters. The Board noted that although recommendations of institutionwide academic policy subcommittees composed entirely of faculty members must be approved by a committee on which students and administrators also participate, the student-faculty-administration committee had invariably approved the recommendations of the faculty subcommittees. In concluding that the faculty controlled curriculum changes, the Board noted that, although the deans in some schools must approve curriculum changes, the dean in one school had approved all of about 500 such changes recommended by the faculty. The Board also found that the faculty controlled the hiring of faculty members and deans, faculty tenure, and had an effective voice in facilities planning and budgetary matters. The board concluded that the faculty were managerial employees under *Yeshiva*.

By contrast, in *Bradford College*, 261 NLRB 565 (1982), the Board found that the faculty were nonmanagerial where governance documents indicated they had substantial authority, but in practice they had little. The Board found that the faculty did not effectively determine teaching loads, salaries, budget, the filing of administrative positions, faculty evaluations, or certain faculty personnel actions. The Board also found that the administration had canceled an academic session without faculty approval, had sometimes altered grades given by faculty members, and at least in some cases had failed to follow faculty recommendations for the hiring of new faculty members. In determining that the faculty lacked effective authority, the Board noted a statement of the president of the college to the effect that it was the administration and not the faculty which set academic and administrative policy. The Board also noted an accrediting agency's report which found disregard for stated procedures and for faculty participation in the administration of the college. The Board concluded, "In sum, while the faculty and division chairs have the written right to make recommendations, the record shows that such recommendations were often ignored or reversed by the president, by the academic dean, or

by both with respect to curriculum, admission policies, graduation of students, course loads, course scheduling, grading of students, faculty hiring or retention, tuition, and faculty salaries."[15]

In a case which, like the present one, involved the faculty of a professional degree-granting institution, *College of Osteopathic Medicine & Surgery*, 265 NLRB 295 (1982), the Board found that the faculty were managerial employees. There the faculty had drafted its own constitution providing for monthly faculty meetings, and had established faculty committees. All voting members of many of the committees, including those concerned with promotion, tenure, postgraduate education, and student promotion and evaluation, were elected by the faculty. In addition to determining curriculum and other academic matters, the college's faculty also was instrumental in bringing about a fundamental change in academic program (conversion from a 3-year to a 4-year course of study). Further, the faculty had considerable authority in faculty hiring, rank, promotion, and tenure decisions. The Board concluded that the faculty had "almost plenary authority in academic matters and significant input into important nonacademic matters."[16] Citing *Yeshiva*, the Board held that the fact that many faculty actions were in the form of recommendations with final authority resting in the administration was not determinative since "faculty recommendations are almost always followed."[17]

Analysis

In the instant case, the judge concluded that under *Yeshiva* and subsequent Board decisions the faculty of Cooper Union have sufficient authority to formulate and effectuate policy to be excluded from the coverage of the Act as managerial employees, and consequently recommended dismissing the complaint. Our disagreement with the judge's conclusion and recommendation stems from our disagreement with certain of his factual findings and from our disagreement with his application of *Yeshiva* principles to the facts of this case.

The judge based his conclusion that the Respondent's faculty members are managerial employees partly on his findings (1) that the faculty predominate in "almost all" of the governance committees; (2) that the administrative committees

[15] *Bradford College*, 261 NLRB at 566-567. The Board also noted that faculty were not granted tenure as a factor indicating lack of faculty authority.

[16] *College of Osteopathic Medicine & Surgery*, supra, 265 NLRB at 297.

[17] Id.

play a central role in faculty involvement in both academic and administrative (financial and personnel) matters; and (3) that significant faculty input into nonacademic matters was shown in the Union's 1979 negotiations with the Respondent resulting in the reintegration of the Liberal Arts and Science faculty into the degree-granting schools. These key findings misinterpret the evidence. It is clear, as noted above, that even according to the terms of the governances, full-time faculty (bargaining unit) members constitute a numerical minority on most of the governance committees and constitute something less than a voting majority on about half of them. The proportion of faculty members who vote on the committees is further reduced in some cases by administrators voting on committees in contravention of the terms of the governances.

We further disagree with the judge's findings that the faculty's role on the administrative committees is indicative of extensive faculty authority. First, as the judge noted, each administrative committee is chaired by a dean who sets the agenda and may prevent the committee from meeting, as the dean of the School of Architecture did for 4 years. Second, as noted above, the academic standards committee of the largest school, Engineering, apparently was entirely eliminated for a 4-year period by the dean's unilateral governnance amendment. Third, the record reflects an extremely limited role played by the administrative committees, when they are functioning, in personnel, financial, and other nonacademic matters. Finally, full-time faculty members constitute a voting minority on the administrative committees in the Schools of Art and Architecture.

Although the judge found, and we agree, that the faculty play a weaker role in nonacademic than in academic matters, he found a significant instance of faculty input into nonacademic decision making in the Union's role in negotiating the 1979 reintegration of the LA&S faculty into the degree-granting schools. While these negotiations did represent faculty involvement in matters which had both academic and nonacademic aspects, we note that the reintegration and reenfranchisement of the LA&S faculty represented a return to the status quo ante which had been pressed by the faculty in a variety of forums for the 4-year period since the administration created the separate faculty. Further, the Respondent's agreement to return to the status quo ante came only after the Middle States Association accrediting

agency had strongly criticized it for the isolation, disenfranchisement, and consequent demoralization of the LA&S faculty. Under these circumstances, we do not think it indicative of strong faculty involvement in institutional policy making that the negotiations succeeded in 1979. The entire episode of the creation of the LA&S faculty, its persistence as an isolated group for 4 years, followed by its reintegration into the rest of the institution's governance system, is more illustrative of the ability of the administration to effectively resist faculty pressure than of the faculty's active participation in institutionwide decision-making.[18]

Although the Respondent's faculty clearly exercise considerable authority in academic areas such as curriculum, admissions, academic standards, course assignments, and scheduling, such authority not only is not absolute as was the authority of the *Yeshiva* faculty, but frequently has been made ineffective by the administration in the variety of ways described above. Of particular significance in this regard are the administration's creation and elimination of entire degree programs without faculty input or over faculty opposition,[19] the exclusion from academic governance of a large proportion of the faculty for a number of years, the amendment of governances without faculty vote,[20] creation of a special admissions program without faculty-approval, and the key roles played by administrators in chairing the faculties, chairing the joint faculty, chairing the administrative committees, and participating actively in other committees. Also highly significant is the fact that the administration first entered into and later extended the library consortium agreement over massive faculty opposition based on academic grounds. In this context, we regard the fact that faculty members are actively involved in making more routine academic decisions such as the substitution of one course for another and, in

[18]Further, we do not regard the faculty's participation in the Academic Freedom and Tenure Committee as indicative of a strong faculty role in nonacademic matters in view of the fact that that committee did not function from 1975 to 1981, and in view of the Respondent's role in preventing it from hearing certain issues involving faculty tenure prior to that time.

[19]In this respect, the present case is similar to *Bradford College*, supra, where the elimination of an academic program without faculty input was a factor relied on by the Board in finding the faculty nonmanagerial.

[20]In this and the other ways, noted above, where stated governance requirements for faculty input have been overlooked by the administration, the present case bears further similarity to *Bradford College*. Similarities also include accreditation agency reports critical of the relative lack of faculty authority in each institution and statements by the respective presidents minimizing faculty authority.

the Schools of Art and Architecture, the admission of individual applicants, does not rise to the level of "represent(ing) management interests by taking or recommending discretionary actions that effectively control or implement employer policy," or "formulat(ing) and effectuat(ing) management policies by expressing and making operative the decisions of their employer" within the meaning of *Yeshiva*. It is clear that the Cooper Union faculty have considerably less effective authority in the academic sphere than did the faculty in *Yeshiva* and the faculties in various Board decisions following *Yeshiva* in which the faculty have been held managerial.[21] Moreover, unlike the *Yeshiva* faculty and the faculties involved in subsequent Board decisions, the Cooper Union faculty lacks substantial input into nonacademic matters such as budget, facilities planning, and personnel decisions. In this regard we note particularly that decisions on the hiring, promotion, tenure, and retention of teaching staff are frequently made in the absence of faculty recommendations, and when they are made following faculty recommendations, those recommendations are frequently rejected.[22]

For the reasons stated above, we conclude that the Respondent's full-time faculty members are not managerial employees under *Yeshiva*, but are employees entitled to the protection of the Act.[23] Accordingly, the Respondent was required to bargain with the Union as the certified representative of the Respondent's full-time faculty and librarians. Therefore, we conclude that, by withdrawing recognition from the Union and thereafter refusing to bargain with it, the Respondent has violated Section 8(a)(5) and (1) of the Act, as alleged.

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[21] For example, in *Ithaca College*, supra, the Board relied on the invariable adoption of faculty recommendations in academic areas as indicative of faculty authority. In the present case, faculty wishes in academic areas have frequently been ignored. Similarly, in *College of Osteopathic Medicine & Surgery*, supra, the Board relied on 100 percent faculty composition of key committees and faculty initiation of a major change in the entire academic curriculum as indicative of faculty authority. In the present case, by contrast, only 1 of some 14 faculty committees is 100 percent faculty in composition, and it was inoperative for most of the 10 years prior to the hearing, and major changes in academic curricula, such as creation and elimination of degree programs, have been made without effective faculty input.

[22] This pattern of ineffective faculty voice in faculty personnel decisions stands in contrast to the strong role played by the faculty in such cases as *Ithaca College* and *College of Osteopathic Medicine & Surgery*.

[23] In light of our finding that the Respondent's full-time faculty members are employees entitled to the protection of the Act, we further find that the Union is a labor organization within the meaning of Sec. 2(5) of the Act.

The Remedy

Having found that by engaging in the above-described conduct the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist therefrom and from any like or related unfair labor practices, and to bargain on request with the Union.

ORDER

The National Labor Relations Board orders that the Respondent, The Cooper Union for the Advancement of Science and Art, New York, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Withdrawing recognition from and thereafter failing and refusing to bargain collectively with the Union as the exclusive bargaining representative of the employees in the bargaining unit described below.

(b) In any like or related matter interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, recognize and bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement; and provide the Union, on request, information necessary for collective bargaining:

> All faculty on full-time appointment including instructors, assistant professors, associate professors, full professors and librarians and assistant librarians but excluding all other employees, including the president, deans, assistant deans, acting deans, division heads, acting division heads, visiting faculty, secretaries, guards, library head, library assistants, library technicians, researchers, laboratory managers, directors, administrators, administrative assistants, administrative counselors, controller, register, provost, maintenance employees, laboratory technicians, laboratory assistants, engineering technicians, shop assistants and all supervisors as defined in the Act.

(b) Post at its facility in New York, New York, copies of the attached notice marked "Appendix."[24] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

Dated, Washington, D.C. 5 February 1985

Donald L. Dotson,
Chairman

Robert P. Hunter,
Member

Patricia Diaz Dennis,
Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[24]If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
AN AGENCY OF THE UNITED STATES GOVERNMENT

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT withdraw recognition from and fail and refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Cooper Union Federation of College Teachers, affiliated with New York State United Teachers, American Federation of Teachers, AFL-CIO, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, recognize and bargain with the above-named Union as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

> All faculty on full-time appointment including instructors, assistant professors, associate professors, full professors and librarians and assistant librarians but excluding all other employees, including the president, deans, assistant deans, acting deans, division heads, acting division heads, visiting faculty, secretaries, guards, library head, library assistants, library technicians, researchers, laboratory managers, directors, administrators, administrative assistants, administrative counselors, controller, register, provost, maintenance

employees, laboratory technicians, laboratory assistants, engineering technicians, shop assistants and all supervisors as defined in the Act.

THE COOPER UNION FOR THE ADVANCEMENT OF SCIENCE AND ART

_____

(Employer)

Dated _____ By _____

(Representative) (Title)

This is an official notice and must not be defaced by anyone. This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Jacob K. Javits Federal Building Room 3614, 26 Federal Plaza, New York, New York 10278, Telephone 212-264-0360.

No. 85-1790

Supreme Court, U.S.
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CLERK

IN THE

Supreme Court of the United States

October Term, 1985

THE COOPER UNION FOR THE ADVANCEMENT OF SCIENCE AND ART,

Petitioner,

against

NATIONAL LABOR RELATIONS BOARD and COOPER UNION FEDERATION OF COLLEGE TEACHERS, AFT, NYSUT, AFL-CIO,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR THE COOPER UNION FEDERATION OF COLLEGE TEACHERS, AFT, NYSUT, AFL-CIO, IN OPPOSITION

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23 pp

Question Presented

Was the finding of the National Labor Relations Board (as affirmed by the court below), that certain college faculty members were not managerial employees, supported by substantial evidence where the faculty did not generally exercise effective recommendation or control in either academic or nonacademic areas, although they did have "significant" authority in some core academic areas?

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IN THE

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October Term, 1985

THE COOPER UNION FOR THE ADVANCEMENT OF SCIENCE AND ART,

Petitioner,

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NATIONAL LABOR RELATIONS BOARD and COOPER UNION FEDERATION OF COLLEGE TEACHERS, AFT, NYSUT, AFL-CIO,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR THE COOPER UNION FEDERATION OF COLLEGE TEACHERS, AFT, NYSUT, AFL-CIO, IN OPPOSITION

Statement of the Case

As cogently summarized by the circuit court panel in the decision below, the nature of the parties[1] and the events leading to the instant litigation are as follows[2]:

1. The parties to the proceeding below were:

(a) National Labor Relations Board ("NLRB" or "the Board")—petitioners below and respondent in this Court;

(footnotes continued on next page)

Cooper Union is a private, non-profit, tuition-free institution of higher education located in Manhattan, consisting of three degree-granting schools: The Schools of Art, Architecture, and Engineering. Cooper Union has a student body of approximately 900 to 1,000 students and employs approximately fifty-five to sixty full-time and eighty part-time faculty members. The Cooper Union Charter vests ultimate authority in a sixteen-member board of trustees, a board which has no faculty representatives on it.

In 1974, following an NLRB-supervised election, the Cooper Union Federation of College Teachers, AFT, NYSUT, AFL-CIO ("the Union") was certified to represent a unit of full-time faculty members and librarians. Part-time (adjunct) faculty, deans, assistant deans, division heads, and the library head were excluded from the bargaining unit. In 1978 the Union and Cooper Union entered into their only collective bargaining agreement, which expired in August, 1980. Shortly before this expiration date, and following the Supreme Court's decision in *NLRB* v. *Yeshiva University*, 444 U.S. 672 (1980), Cooper Union withdrew its recognition of the Union and refused to bargain with it.

An administrative law judge dismissed a complaint against Cooper Union that charged it with unfair labor practices under section 8(a)(5) and (1) of the National

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(b) The Cooper Union for the Advancement of Science and Art ("Cooper Union" or "the Administration")—respondent below and petitioner in this Court. and

(c) Cooper Union Federation of College Teachers, affiliated with American Federation of Teachers, New York State United Teachers, AFL-CIO ("the Union")—intervenor below and respondent in this Court.

2. In this brief, all citations to the opinion of the United States Court of Appeals for the Second Circuit and the decision of the National Labor Relations Board will be to the opinion and decision as reproduced in petitioner's Appendix ("Pet. App.") at pages 1-8 and 10-28 respectively.

> Labor Relations Act ([''NLRA or] ''the Act''), 29 U.S.C. § 158(a)(5) and (1) (1982). He concluded that the full-time faculty were managerial employees within the meaning of *Yeshiva,* and therefore outside the protections of the Act. The Board reversed the ALJ, finding that the bargaining unit members did not exercise sufficient authority over academic matters to be considered managerial employees under *Yeshiva.*

Pet. App. 3-4 (footnote omitted).

In reaching its decision, the unanimous Board panel relied on the ineffectiveness of the faculty's voice in academic decision making, the administration's frequent disregard of the faculty's recommendations regarding appointment, promotion and tenure, and the absence of any faculty role in such crucial non-academic areas as budget, facilities and personnel (Pet. App. 26-27). Consequently, the Board found that petitioner's withdrawal of recognition of (and subsequent refusal to bargain with) the Union violated Sections 8(a)(5) and (1) of the Act (Pet. App. 27).

A unanimous panel of the United States Court of Appeals for the Second Circuit, in a *per curiam* decision, granted the Board's petition for enforcement of its bargaining order. It noted that petitioner's faculty members had ''significant authority in certain core academic matters, but certainly not the 'absolute' authority of *Yeshiva's* faculty, nor even 'effective recommendation or control.' '' (Pet. App. 6, *quoting NLRB* v. *Yeshiva University,* 444 U.S. at 686 and 683 n.17). Furthermore, the court emphasized, ''we would have to ignore the extensive evidence of conflict and of broad administrative authority to implement changes over faculty opposition in core academic areas such as curriculum to find that the Cooper Union faculty is

'aligned with management.' " (Pet. App. 8, *quoting NLRB* v. *Yeshiva University*, 444 U.S. at 683). The court therefore held that substantial evidence in the record as a whole supported the Board's finding that petitioner's faculty were not "managerial employees" since they did not exercise effective recommendation or control in either academic or non-academic areas (Pet. App. 8).

ARGUMENT

I.

THE BOARD AND THE COURT BELOW PROPERLY APPLIED THE PRINCIPLES ENUNCIATED BY THIS COURT IN *NLRB* v. *YESHIVA UNIVERSITY*.

Although the Act does not explicitly exclude managerial employees, as it does supervisors, *see* 29 U.S.C. § 152(3), this Court, in *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 289 (1974), held that the NLRA implies such an exclusion. It was not until *NLRB* v. *Yeshiva University*, 444 U.S. 672 (1980), though, that the Court actually applied the *Bell Aerospace* exclusion to a specific group of employees.

In *Yeshiva*, the NLRB certified the Yeshiva Faculty Association as the collective bargaining representative for the university's full time faculty (including assistant deans and department chairmen). *NLRB* v. *Yeshiva University*, 444 U.S. at 678-79. This Court ruled, however, that because the unit members were "managerial employees" they were exempt from the coverage of the NLRA.

In reaching its decision, the Court majority relied on the extensive authority of the faculty in both academic and non-

academic matters. As this Court noted, the Yeshiva faculty's "authority in academic matters is absolute." *NLRB* v. *Yeshiva University*, 444 U.S. at 686. For example, they determined the curriculum, grading system, and matriculation standards, decided which students would be admitted, and established course schedules. *Id.* In addition, the faculty in *Yeshiva* also played "a predominant role in faculty hiring, tenure, sabbaticals, termination and promotion." *Id.* at 686 n.23. Further, "on occasion their views have determined the size of the student body, the tuition to be charged and the location of a school." *Id.* at 686. Therefore, "[T]o the extent the industrial analogy applies, the faculty determines within each school the product to be produced, the terms upon which it will be offered and the customers who will be served." *Id.* As such, this Court concluded, "the faculty of Yeshiva University 'in effect, substantially and pervasively operat(e) the enterprise' ", *Id.* at 691, *quoting NLRB* v. *Yeshiva University*, 582 F.2d 686, 698 (2d Cir. 1978), and consequently exercise authority "which in any other context unquestionably would be managerial." *NLRB* v. *Yeshiva University*, 444 U.S. at 686. It was this pervasive control that led this Court to conclude that unionization of the Yeshiva faculty would create an unacceptable risk of the kind of divided loyalty the managerial exclusion was intended to avoid. *Id.* at 682, 683 n.17, 684, 687-88, 689-90.

At the same time, this Court acknowledged, "[t]here may be some tension between the Act's exclusion of managerial employees and its inclusion of professionals . . . ." *NLRB* v. *Yeshiva University*, 444 U.S. at 686; *accord. ibid* at 692 (Brennan, J., dissenting). The Court majority thus cautioned against "an application of the managerial exclu-

sion that would sweep all professionals outside the Act in derogation of Congress' expressed intent to protect them." *Id.* at 690. Indeed, in a similar context, this Court subsequently reaffirmed that it would be "extraordinary to read an implied exclusion for . . . employees into the statute that would swallow up and displace almost the entirety of the professional-employee inclusion." *NLRB* v. *Hendricks County Rural Electrical Membership Corp.*, 454 U.S. 170, 185 (1981). Accordingly, this Court expressly noted that there "may be institutions of higher learning unlike Yeshiva where the faculty are entirely or predominantly nonmanagerial" as well as "faculty members at Yeshiva and like universities who properly could be included in a bargaining unit." *NLRB* v. *Yeshiva University*, 444 U.S. at 691 n.31.

Hence, this Court refined its definition of "managerial employees" (*i.e.*, "those who formulate and effectuate managerial policies by expressing and making operative the decisions of their employer") that it had adopted in *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 288 (1974), *quoting Palace Laundry Dry Cleaning Co.*, 75 NLRB 320, 323 n.4 (1974) (*quoted in NLRB* v. *Yeshiva University*, 444 U.S. at 682). In addition, this Court declared: "managerial employees must exercise discretion within, or even independently of, established employer policy and must be aligned with management." *NLRB* v. *Yeshiva University*, 444 U.S. at 683. As such, "professors may not be excluded because they determine the content of their own courses, evaluate their own students, and supervise their own research." *Id.* at 690-91 n.31. Therefore, "[o]nly if an employee's activities fall outside the scope of the duties routinely performed by similarly situated professionals will he be found aligned with management." *Id.* at 690.

In the instant matter, the Board and the court below properly applied the standards set forth in the *Yeshiva* decision. For example, in concluding that the Cooper Union faculty were not managerial employees, the unanimous Board panel explained:

> Although the [petitioner's] faculty clearly exercise considerable authority in academic areas such as curriculum, admissions, academic standards, course assignments, and scheduling, such authority not only is not absolute as was the authority of the *Yeshiva* faculty, but frequently has been made ineffective by the administration. Of particular significance in this regard are the administration's creation and elimination of entire degree programs without faculty input or over faculty opposition, the exclusion from academic governance of a large proportion of the faculty for a number of years, the amendment of governances without faculty vote, creation of a special admissions program without faculty approval, and the key roles played by administrators in chairing the faculties, chairing the joint faculty, chairing the administrative committees, and participating actively in other committees. . . . [While the] faculty members are actively involved in making more routine academic decisions such as the substitution of one course for another and, in the Schools of Art and Architecture, the admission of individual applicants . . . [i]t is clear that the Cooper Union faculty have considerably less effective authority in the academic sphere than did the faculty in *Yeshiva* and the faculties in various Board decisions following *Yeshiva* in which the faculty have been held managerial. Moreover, unlike the *Yeshiva* faculty and the faculties involved in subsequent Board decisions, the Cooper Union faculty lacks substantial input into non-academic matters such as budget, facilities planning, and personnel decisions. In this regard we note particularly that decisions on the

> hiring, promotion, tenure, and retention of teaching staff are frequently made in the absence of faculty recommendations, and when they are made following faculty recommendations, those recommendations are frequently rejected.

Pet. App. 26-27 (footnotes omitted).

Therefore, based upon the ineffectiveness of the faculty's voice in academic decision-making, the administration's frequent disregard of the faculty's recommendations regarding appointments, promotion and tenure, and the absence of any faculty role in such crucial non-academic areas as budget, facilities and personnel, both the Board and the court below correctly concluded that petitioner's full time faculty were not managerial employees.

II.

THERE IS NO SPLIT AMONG THE CIRCUIT COURTS OVER THE PROPER APPLICATION OF *YESHIVA*.

In seeking a writ of certiorari, petitioner purports that the circuit courts are in conflict in applying the standards set forth by this Court to determine whether or not particular college faculty members are managerial employees (Pet. 6-11). Yet, none of the circuit courts have recognized the existence of such a split. Moreover, scrutiny of the circuit court decisions reveals that not only are the facts in *NLRB* v. *Lewis University*, 765 F.2d 616 (7th Cir. 1985) clearly distinguishable from those in *Loretto Heights College* v. *NLRB*, 742 F.2d 1245 (10th Cir. 1985) and the present matter, but the underlying rationales in all of these cases are in harmony as well.

For example, in holding a unit of faculty members (including, unlike here, department chairpersons) to be managerial employees excluded from coverage under the NLRA, a Seventh Circuit panel majority noted that: "The full-time faculty, through their collective participation on faculty committees, as departmental chairpersons, and as members of the "faculty convened", determine student admission policies, graduation requirements, grading guidelines, curriculum changes, degree offerings, academic calendar matters, faculty tenure, faculty promotions, and faculty hiring within the college." *NLRB* v. *Lewis University*, 765 F.2d at 628.

"In stark contrast", the *Lewis* court observed:

> Loretto Heights College did not have a "faculty convened" that approved proposals and recommendations emanating from the faculty committees. Instead, the proposals of faculty committees at Loretto Heights were submitted directly to the administration and underwent several levels of administrative review. The court in *Loretto Heights* found that "faculty power at the College, whatever its extent on paper, is in practice severely diluted," as evidenced by the infrequent, insignificant work of faculty committees, the faculty's limited decision-making authority, and the several layers of administrative review.

NLRB v. *Lewis University*, 765 F.2d at 628, (footnote omitted) *citing Loretto Heights College* v. *NLRB*, 742 F.2d at 1254. Consequently, the majority dismissed the dissenter's assertion that its disposition of the case before it created a conflict with the Tenth Circuit as having "no basis in law or fact". *NLRB* v. *Lewis University*, 765 F.2d at 628.

The facts in the instant case are similarly distinguishable from those present in *Lewis*. For example, while the

faculty at Lewis University elected their own department chairpersons, *NLRB* v. *Lewis University*, 765 F.2d at 622, petitioner's president vetoed a governance amendment passed by the faculty of its then School of Art and Architecture which would have required faculty election of division heads (Pet. App. 15 n.5). In addition, over an eight year period, only five of 118 faculty committee recommendations for tenure and promotion were rejected by the Lewis University administration. *NLRB* v. *Lewis University*, 765 F.2d at 623. At Cooper Union, by contrast, faculty tenure and promotion recommendations were frequently rejected (Pet. App. 7, 21). Furthermore, through its exclusive participation in the Budget Review Committee, the Lewis University faculty exercised effective control of the university's fiscal affairs. *NLRB* v. *Lewis University*, 765 F.2d at 622-23. Cooper Union faculty, however, had virtually no role in the areas of budget and facilities (Pet. App. 7, 21). Moreover, while proposed bargaining unit members at Lewis University effectively determined sabbatical leaves, *NLRB* v. *Lewis University*, 765 F.2d at 624, petitioner exercised exclusive authority in making leave of absence and sabbatical determinations (Pet. App. 7-8, 21).

Most importantly, in Cooper Union there is simply no faculty instrumentality even remotely resembling the "faculty convened" at Lewis University (composed of all full-time faculty) which was responsible for "the formulation of all major educational policies at the College." *NLRB* v. *Lewis University*, 765 F.2d at 622. Indeed, as elaborated in greater detail in Part III, *infra*, petitioner's portrait of Cooper Union as an institution operated under a traditional collegial model of decision-making is manifestly belied by the actual facts of this case. Therefore, petitioner's re-

liance on the Seventh Circuit panel's emphasis on "[t]he collegial decision-making process that pervades a university such as Lewis" is clearly misplaced. *NLRB* v. *Lewis University*, 765 F.2d at 626.

Unlike the factual differences between *Lewis University*, on the one hand, and *Loretto Heights College* and *Cooper Union* on the other, the legal analyses employed by the circuit courts in the three post-*Yeshiva* cases are remarkably similar. For example, notwithstanding petitioner's contrary assertion (Pet. 9), the Second Circuit did *not* find the faculty of Cooper Union to be non-managerial merely because they constituted a minority on various committees. Rather, the Second Circuit's holding is obviously bottomed on petitioner's refusal to afford its faculty *any* meaningful role in a variety of core academic areas (Pet. App. 6-7 & nn.3-5).

Petitioner's claim that the *Loretto Heights* and *Cooper Union* courts placed undue emphasis on non-academic matters in deciding that the respective faculties were not managerial employees (Pet. App. 9-10), is equally spurious. As the Tenth Circuit declared:

> Since the 'business of a university is education,' we must focus our attention on the faculty's role in academic affairs in order to determine the question of managerial status.

Loretto Heights College v. *NLRB*, 742 F.2d at 1252 (footnote omitted), *quoting NLRB* v. *Yeshiva University*, 444 U.S. at 688. Likewise, in the case at bar, the Second Circuit actually held that "the Cooper Union faculty did not exercise effective recommendation or control" in *either* academic or non-academic areas (Pet. App. 8).

Finally, despite petitioner's semantic legerdemain (*see*, Pet. 10-11), the standard employed by each of the circuit courts in determining the degree of authority necessary to confer managerial status on college faculty members was the same. Pursuant to *Yeshiva*, all three courts focused on whether or not the respective faculties possessed "effective recommendation or control." *NLRB* v. *Yeshiva University*, 44 U.S. at 683 n.17. *Compare*, Pet. App. 8, *with Loretto Heights College* v. *NLRB*, 742 F.2d at 1254, and *NLRB* v. *Lewis University*, 765 F.2d at 627. As such, there is no need for this Court to resolve a mythical split amongst the circuits.

III.

THE FACTS OF THIS CASE RENDER IMMATERIAL THE ISSUE RAISED BY PETITIONER.

Even assuming *arguendo* that inconsistencies of analyses by the circuit courts imaginably exist, resolution of the question presented by petitioner would provide little, if any, guidance to the Board or the circuit courts in applying the principles enunciated by this Court in *Yeshiva*. In particular, a standard that faculty members who exercise "significant . . . authority in academic matters" are managerial employees merely invites further litigation as to: a) the meaning of "significant authority"; b) what is or is not an "academic matter"; and c) the relative weight to be assigned particular academic matters where faculty power over such components varies widely.

Apparently cognizant of the nebulousness of the issue it purports to raise, petitioner ultimately reveals the actual

rule of law it seeks this Court to endorse. Thus, petitioner avers that only when "the actual structure of an institution has more in common with the industrial model than with the traditional collegial model can it be justifiable to treat faculty members as non-managerial employees subject to the National Labor Relations Act" (Pet. at 12-13). Respondent Union submits, however, that petitioner's "structural" standard is a radical and unwarranted departure from this Court's "operational" standard which is at the core of the managerial employee exclusion. *See, NLRB* v. *Bell Aerospare Co.*, 416 U.S. 267, 290 n.19 (1974) ("[T]he question whether particular employees are 'managerial' must be answered in terms of the employees' actual job responsibilities, authority, and relationship to management").

Moreover, if the structure of an institution were of paramount importance in determining the managerial status of particular employees, one would assume that managers play a substantial role in defining that structure. Yet, the record in this case is replete with instances where the only role the faculty played in determining petitioner's structure was that of *adversary*. Therefore, even under the inappropriate rule petitioner advocates, petitioner's claim still fails.

In concluding that the Cooper Union faculty are nonmanagerial, both the Board and the court below relied, in large part, on an extensive history of faculty-administration conflict as demonstrated by a long pattern of administrative actions taken over strong and persistent faculty opposition. As such, unlike *Yeshiva* where "[t]he university was in effect compelled to rely upon the faculty for advice, recommendations, establishment of policies and implemen-

tation of policies'', *Loretto Heights College* v. *NLRB*, 742 F.2d 1245, 1254 (10th Cir. 1984), in the case at bar, petitioner often made decisions without faculty input and, in many important instances, over faculty objections. For example, both the Board and the court below found the following:

1. In 1972, the Board of Trustees eliminated the existing departmental structure over faculty objection and created new degrees in mathematics and science without faculty input (Pet. App. 6 n.3, 15-16).

2. In 1973, the administration implemented changes that included increasing class size, the student-faculty ratio, and teaching loads, severely limiting tenure grants, reducing the number of faculty through attrition, and increasing the proportion of adjunct faculty. These changes were implemented while still under consideration by the student-faculty Senate (Pet. App. 6 n.3, 16).

3. In 1975, without faculty participation and over strong faculty opposition, the Trustees eliminated the divisions and divisional heads and created a new ''faculty of liberal arts and science'' entirely outside the degree-granting schools thereby effectively disenfranchising almost half the faculty since they no longer had a vote on the faculties of any of the degree-granting schools and were unable to participate in the governance committees (Pet. App. 6 n.4, 16).

4. In the 1975 restructuring, the Trustees also eliminated the curricula leading to degrees in mathematics, physics, and distributive science resulting in the permanent layoff of eight tenured faculty members (Pet. App. 6 n.4, 16).

5. In 1975, the dean of the School of Engineering, without faculty consideration, eliminated the administrative committtee, delegating all administrative functions to the dean (Pet. App. 7 n.5, 17).

6. In 1975, the Faculty Senate voted to cease meeting because it was a group without any power and remained defunct for approximately three years thereafter (Pet. App. 8, 17).

7. In 1977, over strong faculty opposition, Cooper Union entered into a library consortium that delegated administrative control and purchasing to New York University (Pet. App. 7 n.5, 17).

8. For four years petitioner's president refused to call any institution-wide joint faculty meetings. Between 1977 and 1981, the dean of the School of Architecture prevented that School's administrative committee from meeting by simply failing to call any meeting thereby bypassing the administrative committee's role in reviewing proposed curriculum changes (Pet. App. 20-21, *see*, Pet. App. 6-7).

9. In 1978, a report by the Middle States Association of Colleges and Schools, an accrediting agency, found that Cooper Union's deans were unusually strong and the faculty were unusually weak and noted the absence of any provision for faculty review of institution-wide academic policies (Pet. App. 8 n.6, 18).

Clearly then, in marked contrast to the apocryphal vision of a tranquil "community of scholars" portrayed by peti-

tioner, a fair appraisal of the record in this case reveals a picture of chronic conflict redolent of classic industrial strife. Consequently, even if the issue in this case is set forth on petitioner's own terms, petitioner should not prevail. Indeed, respondent Union submits that it was precisely because of the type of turmoil so evident in the case at bar that Congress enacted the National Labor Relations Act and deliberately chose to grant professional employees the right to participate in the collective bargaining process.

It is axiomatic that "[w]hile this Court decides questions of public importance, it decides them in the context of meaningful litigation. Its function in resolving conflicts among the Courts of Appeals is judicial not simply administrative or managerial." *"SS Monrosa"* v. *Carbon Black Export Inc.*, 359 U.S. 180, 184 (1959). Thus, even if a conflict among the circuits as to the proper application of *Yeshiva* can be presently divined, this case is simply not an adequate vehicle for resolving the alleged problem. Accordingly, it is respectfully submitted that there is no need for this Court to resolve a hypothetical question not squarely presented here.

Conclusion

For all of the foregoing reasons, the petition for a writ of certiorari should be denied.

Dated: New York, New York
May 29, 1986

Respectfully submitted,

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No. 85-1790

In the Supreme Court of the United States

OCTOBER TERM, 1985

COOPER UNION FOR THE ADVANCEMENT OF SCIENCE AND ART, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the National Labor Relations Board correctly found that the full-time faculty members employed by petitioner are not managerial personnel excluded from the coverage of the National Labor Relations Act.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-8) is reported at 783 F.2d 29. The decision and order of the National Labor Relations Board (Pet. App. 10-31) is reported at 273 N.L.R.B. No. 214.

JURISDICTION

The judgment of the court of appeals (Pet. App. 9) was entered on January 30, 1986. The petition for a writ of certiorari was filed on April 29, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a private, nonprofit institution of higher education consisting of three professional schools: art, engineering and architecture. It has approximately 1,000 students and employs about 60 full-time and 80 part-time faculty members. In 1978, the Cooper Union Federation of College Teachers, which had been certified as the bargaining representative of petitioner's full-time faculty members and librarians (Pet. App. 11), entered into a collective bargaining agreement with petitioner. In 1980, shortly before the agreement was to expire, petitioner informed the Union that it was withdrawing recognition (Pet. App. 3-4). Petitioner asserted that the faculty members were managerial personnel within the meaning of this Court's decision in *NLRB* v. *Yeshiva University*, 444 U.S. 672 (1980), and were therefore excluded from the coverage of the National Labor Relations Act.

2. The National Labor Relations Board's administrative law judge concluded that the faculty members were managerial employees within the meaning of *Yeshiva* and dismissed a complaint charging petitioner with violating Section 8(a)(1) and (5) of the Act, 29 U.S.C. 158(a)(1) and (5). The Board disagreed, finding that the authority of the faculty "does not rise to the level of 'represent(ing) management interests by taking or recommending discretionary actions that effectively control or implement employer policy,' or 'formulat(ing) and effectuat(ing) management policies by expressing and making operative the decisions of their employer' within the meaning of *Yeshiva*" (Pet. App. 27). The Board explained that the faculty's authority in academic areas had been "made ineffective by the administration" in a "variety of ways," and that the "faculty lacks substantial input into nonacademic matters" as well (Pet. App. 26-27).

At the outset, the Board found that petitioner's charter vests ultimate authority for management and control of the institution in a Board of Trustees. No faculty representatives are on the Board. General supervisory powers over the day-to-day operations of the school are vested in the president, who is responsible for the appointment and removal of administrators, faculty and staff, and for the determination of their duties. General supervisory authority over academic affairs and officers is vested in a provost. Pet. App. 11.

The Board found that petitioner's faculty's role in institutional decision-making is formally defined in a faculty manual and in each separate school's set of "governances." Pursuant to these governances, the faculty members of each of the three schools meet as a deliberative body. The dean of each school serves as the permanent chairperson and exercises the responsibility "for calling and presiding over faculty meetings, preparing the agenda, and communicating faculty actions to the president." Pet. App. 11-12. The governances further provide that the faculty is to carry out its duties through members' participation in certain standing committees—including administrative, admissions, academic standards, curriculum, calendar and schedules (Pet. App. 12). Two joint standing committees—student activities and academic freedom and tenure—have also been established on an institution-wide basis.

The Board found, however, that the structure established by the governances did not give the faculty substantial authority. The Board noted "that even according to the terms of the governances, full-time faculty * * * members constitute * * * something less than a voting majority on about half of [the standing committees]. The proportion of faculty members who vote on the committees is further reduced in some cases by administrators voting on committees in contravention of the terms of the governances." Pet.

App. 25. "[E]ach administrative committee," moreover, "is chaired by a dean who sets the agenda and may prevent the committee from meeting, as the dean of the School of Architecture did for 4 years." As a result, the Board noted, "the record reflects an extremely limited role played by the administrative committees, when they are functioning, in personnel, financial, and other nonacademic matters" (Pet. App. 25).

The Board found further, based on a long history of administrative decisionmaking without faculty participation, that the faculty did not exercise significant authority in either academic or nonacademic matters. In 1972, without faculty participation, the administration implemented a major reorganization of the University, eliminating the previous department structure, consolidating the various departments into divisions, and appointing new division heads. The administration thereafter rejected a faculty recommendation that the division heads be appointed by the faculty. Again without faculty participation, the administration in 1972 created new degrees in mathematics and science. Pet. App. 15-16.

In 1973, the provost, whose job had been created and who had been selected without faculty participation (Pet. App. 16), issued a report recommending increases in class size, student-teacher ratio and teaching loads; severe limitations on grants of tenure; decreases in the number of full-time faculty; and increases in the proportion of adjunct faculty members to full-time faculty. While the student-faculty Senate was considering these proposals, the administration implemented them. When the faculty protested these unilateral changes, the provost suggested that the Senate "could be most useful by simply approving the proposals" (*ibid.*). Thereafter, relying on these new policies, petitioner's president began to reject many tenure recommendations--including cases where the candidate had received unanimous faculty support (*ibid.*).

The Board found that in 1975 the administration, again without faculty participation, announced additional restructuring of the University as well as the elimination of several academic programs. The division structure was abolished; the School of Art and Architecture was divided into two separate schools; and a new Faculty of Liberal Arts and Science ("LA&S") was established outside of the degree-granting schools. The members of the LA&S faculty, constituting nearly half of all faculty members, were thereby disfranchised, since they had no right to vote on any governance committee. Pet. App. 16. The trustees also eliminated the curricula leading to degrees in mathematics, physics and distributive science, and eliminated physical education as a regular part of the curriculum. As a result of these changes, a number of tenured faculty members were permanently laid off. On no occasion was the faculty consulted or informed in advance about any of these actions. Pet. App. 16-17.[1]

The Board found that two years later petitioner's president announced plans to enter into a library consortium with New York University and another university. Under this proposed arrangement, administrative and purchasing decisions for the libraries of all three schools would be made by an N.Y.U. administrator. The proposal elicited substantial faculty resistance. Nevertheless, during the summer recess, and before the faculty had had sufficient time to present its objections, petitioner entered into the consortium agreement. Pet. App. 17-18.

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[1]In 1975, after petitioner's president informed the faculty-student Senate that he was required neither to consult with it nor accept its advice, the Senate disbanded. It thereafter remained defunct for about three years until after the collective bargaining agreement was entered into. Pet. App. 17.

The Board found the faculty's lack of effective authority particularly striking in routine academic and nonacademic areas. The faculty's recommendations concerning teaching appointments and tenure decisions were routinely ignored. Faculty members had no role in granting sabbatical leaves. Faculty members had "virtually no role in the areas of budget and facilities. Major decisions to sell and renovate facilities and to relocate personnel and activities within them have been made without faculty input or over faculty opposition. Similarly, faculty office space is assigned by the administration." The faculty has had no role in the appointment, retention, or employment conditions of nonteaching staff. Pet. App. 21.

3. The court of appeals granted enforcement of the Board's order to bargain (Pet. App. 3). It found that there was "substantial evidence that the Cooper Union faculty did not exercise effective recommendation or control in academic or nonacademic areas, and that they are not managerial or supervisory employees" (Pet. App. 8). The court noted, first, that the Board's finding that faculty authority was "ineffective in core academic areas" was "amply supported by the record" (Pet. App. 7). There was, the court said, "extensive evidence of * * * broad administrative authority to implement changes over faculty opposition in core academic areas such as curriculum" (Pet. App. 8). It added, morever, that "in the nonacademic areas noted by the Court in *Yeshiva* the faculty was extremely weak" (Pet. App. 7).

ARGUMENT

The court of appeals, enforcing the decision of the Board, properly applied the principles established in *NLRB* v. *Yeshiva University*, 444 U.S. 672 (1980), to the circumstances of this case. The court's decision is consistent with those of other circuits, and the circuits are not, as

petitioner claims, in any "disarray" (Pet. 7). Accordingly, review by this Court is unwarranted.

1. In *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 288 (1974), the Court defined managerial employees—who are not entitled to the benefits of collective bargaining under the Act—as those who " 'formulate and effectuate management policies by expressing and making operative the decisions of their employer.' " In *Yeshiva*, the Court ruled that a university faculty falls within this definition if it "exercise[s] authority which in any other context unquestionably would be managerial" (444 U.S. at 686), even though, as is typical in the university context, authority is not arranged hierarchically but is shared between the administration and one or more faculties (*id.* at 680).

In *Yeshiva*, although it noted that "[u]niversity-wide policies [were] formulated by the central administration with the approval of the Board of Trustees", (444 U.S. at 675), the Court found that the faculty did exercise managerial authority (*id.* at 686):

> Their authority in academic matters is absolute. They decide what courses will be offered, when they will be scheduled, and to whom they will be taught. They debate and determine teaching methods, grading policies, and matriculation standards. They effectively decide which students will be admitted, retained, and graduated. On occasion their views have determined the size of the student body, the tuition to be charged, and the location of a school. When one considers the function of a university, it is difficult to imagine decisions more managerial than these.

The Court recognized, however, that "[t]here * * * may be institutions of higher learning unlike Yeshiva where the faculty are entirely or predominantly nonmanagerial" (444 U.S. at 691 n.31). In the present case, the Board and the

court of appeals correctly decided that petitioner is such an institution. The Board's findings, amply supported by the evidence and affirmed by the court of appeals, demonstrate that petitioner's faculty lacked any effective voice in school affairs—either academic or nonacademic. In every area of university governance, petitioner's faculty was effectively disfranchised: hiring, curriculum, university structure, budget, tenure, scheduling, and admissions. The contrast with Yeshiva University—in which faculty and administration shared authority in virtually all areas—could not be more stark. The court of appeals took careful note of this Court's holding in *Yeshiva* but found that here there was "substantial evidence that the Cooper Union faculty did not exercise effective recommendation or control in academic or nonacademic areas" (Pet. App. 8) and the Board was therefore justified in reaching a different result. This decision does not warrant further consideration by this Court.[2]

A faculty may, of course, be "managerial" even if its authority over management matters is not formally defined in writing: some of the power exercised by the *Yeshiva* faculty was described by this Court as advisory and informal. (444 U.S. at 675-677). Equally clearly, a faculty does

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[2]Contrary to petitioner's suggestion (Pet. 9), the Second Circuit did *not* treat "collegiality" at Cooper Union "as evidence of a lack of managerial authority." Rather, the court regarded the presence of administrators on faculty committees, coupled with the virtually unfettered "power of deans to control the agenda and meeting times of many of the committees" (Pet. App. 6-7), as undermining even the limited apparent grant of power to the faculty. Nor is petitioner correct in chastising the court of appeals for considering in its analysis the absence of faculty control in nonacademic areas. The court's approach was entirely consistent with the analysis of this Court in *Yeshiva*. See 444 U.S. at 677 & n.6.

not become nonmanagerial merely by disagreeing with the university administration, or by losing many of the battles.[3] The Court squarely held in *Yeshiva* that the sharing of authority between administration and faculty—typical of the mature private university—does not make the faculty "employees" under the Act. 444 U.S. at 680, 688-689. The "controlling consideration" underlying the Court's decision in *Yeshiva* was that the faculty exercised substantial authority over the academic matters that are the core of university management in a typical university. (444 U.S. at 686). Neither by charter nor by tradition nor in practice did the petitioner's faculty exercise any such power.

2. Petitioner does not appear to dispute the findings underlying the Second Circuit's decision, which are in any event amply supported by the record evidence. Rather, relying on *Loretto Heights College* v. *NLRB*, 742 F.2d 1245 (10th Cir. 1984), and *NLRB* v. *Lewis University*, 765 F.2d 616 (7th Cir. 1985), petitioner contends (Pet. 7) that certiorari is warranted because the circuits are in disarray as to the "type of control that renders a faculty managerial." There is no substance to that contention.

In *Loretto Heights*, the Tenth Circuit, enforcing an order of the Board, concluded that the faculty in that case did not have managerial status. It found that, as at Cooper Union, "the faculty's authority in most aspects of College governance is severely circumscribed" (742 F.2d at 1252). Thus, in academic areas the faculty's authority had been "severely diluted" (*id.* at 1254) by "the infrequent or insignificant

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[3]It would be especially inappropriate to base the decision whether or not a faculty is "managerial" on whether it has recently won or lost major disputes with the administration. The Board's recital of petitioner's long history of disregarding faculty views demonstrated not that the tide had been running against the faculty, but, rather, that the faculty had no significant role in the procedures by which decisions were made.

nature of some committee work, the mixed membership of many committees, the faculty's limited decision making authority, and the layers of administrative approval required for many decisions" (*ibid.*). Moreover, the court noted, "outside the academic sphere" the faculty "plays little if any role" (*id.* at 1252). Faculty members had "a very limited degree" of input into the budgetary process, and "play[ed] virtually no role in the admission, retention and expulsion of students from the College, the size of the student body, awarding honorary degrees, establishing tuition requirements, or making financial aid determinations" (*ibid.*). Finally, as the Tenth Circuit observed, Loretto Heights was structurally distinguishable from Yeshiva. The administration of Loretto Heights was "fairly large in relation to the size of the college" and had developed a " 'very effective buffer' " between top management and faculty. (*id.* at 1254). Because the college did not "need to rely extensively on the professional judgment of its faculty in determining and implementing academic policy (*ibid.*)—in sharp contrast to the structural needs of Yeshiva, (see 444 U.S. at 689)—the Loretto Heights faculty was not "aligned with management" for purposes of the National Labor Relations Act. (742 F.2d at 1254).

Applying the *Yeshiva* principles, the Seventh Circuit reached a different result on the facts in *NLRB* v. *Lewis University*, 765 F.2d 616 (1985). There, declining to enforce an order of the Board, the court found the Lewis faculty to be managerial. The factors considered by the court were precisely those analyzed by this Court in *Yeshiva*, by the Tenth Circuit in *Loretto Heights*, and by the Second Circuit in this case. Thus, surveying the structure and practice at Lewis, the court of appeals noted (765 F.2d at 628).

> [T]he full-time faculty of the College of Arts and Sciences at Lewis University have substantial authority, responsibility, and control of the formulation and

implementation of educational policies within the college. The full-time faculty, through their collective participation on faculty committees, as departmental chairpersons, and as members of the "faculty convened," determine student admission policies, graduation requirements, grading guidelines, curriculum changes, degree offerings, academic calendar matters, faculty tenure, faculty promotions, and faculty hirings within the college. Thus, the faculty governance structure within the College of Arts and Sciences is clearly distinguishable from the very limited faculty participation in the governance of Loretto Heights College.

The results in this case, in *Lewis*, and in *Loretto Heights* are attributable not to any misunderstanding of this Court's *Yeshiva* decision, nor to any conflict among the circuits over how that decision should be applied. Rather, each court, faced with an individual set of facts, analyzed the structure and practice within the particular school in light of the standards established in *Yeshiva*. The Court's decision in *Yeshiva* contemplated that there would be such factual differences between different colleges, (see 444 U.S. at 690 n. 31); that this prediction has proved correct does not warrant review of fact-bound decisions, like the present one, that are entirely faithful to the principles of *Yeshiva*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1986

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[4]The Solicitor General is disqualified in this case.

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Respondents.

ON PETITION FOR A WRIT OR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Cooper Union has petitioned for certiorari because the area, nature, and degree of authority that renders a faculty "managerial" under *NLRB* v. *Yeshiva University*, 444 U.S. 672 (1980), is an important question of law upon which three circuit courts have rendered conflicting decisions. The Board and the Union do not dispute the importance of this question, but contend that the decision below is "fact-bound" and deny any inconsistency in application of the legal principles of *Yeshiva* by the circuit courts.

ARGUMENT

1. The petition presents a pure question of law. There is no issue of "substantial evidence" (Union Br. at I) because the material facts are not in dispute. The trial judge, upon weighing all the evidence of faculty and administration authority, found that the faculty's authority was predominant in academic areas (Pet. 4); the Board, while disagreeing with the trial judge's "application of *Yeshiva* principles to the facts of this case" (Pet. App. 24), agreed that the faculty "clearly

exercise considerable authority in academic areas" (*id.* 26); and the Court of Appeals likewise determined that the faculty "has significant authority in certain core academic matters" (*id.* 6). Thus all agree that the Cooper Union faculty shares in the management of the institution, wielding significant but not absolute authority in academic matters.

> The Board now concedes that under *Yeshiva*
>
> the sharing of authority between administration and faculty—typical of the mature private university—does not make the faculty "employees" under the Act.... The "controlling consideration" ... in *Yeshiva* was that the faculty exercised substantial authority over the academic matters that are the core of university management in a typical university.

(Board Br. at 9.) Under this interpretation of *Yeshiva*, upon the agreed facts as to shared management at Cooper Union the faculty is unquestionably managerial. Since the court below disagreed with this interpretation, certiorari should be granted "to resolve [the] apparent misunderstanding as to the application of [this Court's prior] decision ...." *Arkansas* v. *Sanders*, 442 U.S. 753, 754 (1979).

2. The Board now contends that there is no conflict in principle among the circuit courts that have been called upon to apply the legal principles of *Yeshiva* to other university faculties. This denial of any conflict is surprising, since it is at odds with the Board's own prior positions.

In *Loretto Heights College*, 264 N.L.R.B. 1107 (1982), *Lewis University*, 265 N.L.R.B. 1239 (1982), and *Cooper Union*, Pet. App. 10, the Board ruled that the faculty in each case must be regarded as nonmanagerial under the legal principles of *Yeshiva*. The Board then argued to the circuit court in each case that a proper understanding of *Yeshiva* required enforcement of its decision. The Tenth Circuit in *Loretto Heights*, 742 F.2d 1245 (10th Cir. 1984), and the Second Circuit in the decision below, Pet. App. 1, agreed with the Board; but the Seventh Circuit in the *Lewis* case, 765 F.2d 616 (7th Cir. 1985), rejected the Board's analysis and denied enforcement.

Thus, in the Board's own view, the Seventh Circuit's decision in *Lewis* represents a divergence from proper interpretation of *Yeshiva* and a conflict with those courts that have accepted the Board's interpretation. This was made explicit by the one judge on the Seventh Circuit panel who shared the Board's understanding of *Yeshiva*; that judge specifically stated that the majority's refusal to enforce the Board's order

> creates a conflict with the Tenth Circuit, which recently enforced a similar order under virtually identical circumstances. *See Loretto Heights College* . . . .

Lewis, 765 F.2d at 628-29 (Swygert, Senior Circuit Judge, dissenting). Now that the court below has adopted the Board's reasoning in this case, the conflict among the circuits over the proper interpretation and application of *Yeshiva* extends to the Second Circuit as well.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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